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Volume LX

January—June, 1931.

PUBLISHED BY

MR. R. NARAYANASWAMI IYER, B.A., B.L.,

Advocate, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.

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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1931.

Chief Justice.

The Hon. Sir Horace Owen Compton Beasley, *Kt.*, Bar.-at-Law.

Puisne Judges.

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THE

Madras Law Journal Reports.

VOL.] JANUARY, 1931. [LX.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD TOMLIN, LORD THANKERTON AND SIR LANCELOT SANDERSON.

Annamalai Chettiar and others .. *Appellants**

v.

A.M.K.C.T. Muthukaruppan Chettiar and another .. *Respondents.*

P. C.

Annamalai Chettiar v. Muthukaruppan Chettiar.

Indian Limitation Act (IX of 1908), S. 10, Arts. 62, 120—Trust for a specific purpose—Equitable claim for account against trustee—Accrual of right to sue—Denial of right.

In order to bring a case within the purview of section 10 of the Limitation Act, there must be a trust *for a specific purpose, i.e.*, a purpose that is either actually and specifically defined in the terms of the Will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed.

Khaw Sim Tek v *Chuah Hooi Gnoh Neok,* (1921) L.R. 49 I.A. 37: 30 M.L.T. 160 (P.C), followed.

The article of the Limitation Act applicable to an equitable claim against a trustee, liable to account, for an account and ascertainment of what may be due, is the residuary Art. 120, and not Art. 62, and limitation does not begin to run until the "right to sue" accrues, *i.e.*, until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant. Consequently, the plea of limitation fails when the defendant is unable to specify the particular date at which the claim to an account was denied by him.

Gooroo Das Pyne v. *Ram Narain Sahoo,* (1884) L.R. 11 I.A. 59: I.L.R. 10 C. 860 (P.C.) and *Mst Bolo* v. *Mst. Koklan,* (1930) 59 M.L.J. 621 (P.C.), followed.

Appeal and a cross-appeal (No. 96 of 1928) from the decree of the High Court of Judicature at Rangoon, dated the

*P.C. Appeal No 96 of 1928. 14th October, 1930.

P. C.
Annamalai Chettiar v. Muthukaruppan Chettiar.

18th May, 1927, setting aside a decree of the District Court of Thaton, dated the 4th May, 1926.

The facts of the case are sufficiently fully set out in their Lordships' judgment.

Raikes, K.C. and *McNair* for appellants-defendants.

Pennell for respondents-plaintiffs.

14th October, 1930. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The parties to this appeal are Chettiar money-lenders and bankers. The plaintiff-respondents represent the firm of A.M.K. Chettiar, and the defendant-appellants represent the N.R.M.A. Chettiar firm. Other defendants to the suit, who are not appellants, represented the S.K.T. Chettiar firm and the R.M.A.T. Chettiar firm. The respondents A.M.K. derive their interest under an assignment from R.M.A.T. and the appellants under an assignment from S.K.T. and another Chettiar firm T.A.R.M. The effect of these assignments is in issue in the suit.

Prior to the death of one Vijayan Servai, in March, 1904, S.K.T. had made considerable monetary advances to him, and after his death up to 1906 they had made certain further advances to the administrator of his estate. These advances had been secured by a mortgage for Rs. 10,000, dated the 22nd September, 1902, and other securities in favour of S.K.T. In fact, the money for these advances was provided jointly by S.K.T., R.M.A.T., and another Chettiar firm, T.A.R.M.; the interest of the last-named firm was subsequently taken over by S.K.T., and T.A.R.M. need not be further considered. It is now agreed that R.M.A.T. provided one-fourth of the advances.

In March, 1906, the heirs of Vijayan Servai filed a suit for administration of his estate, to which the administrator of his estate and S.K.T. were called as defendants, in the District Court of Moulmein. The suit was defended.

On the 26th September, 1906, an indenture was executed to which S.K.T., T.A.R.M. and N.R.M.A. were parties, but to which R.M.A.T. were not parties. By that deed S.K.T. and T.A.R.M. transferred and assigned to N.R.M.A., the present appellants, all the outstanding debts due from the estate of Vijayan Servai, all interest accruing from 21st June, 1906, and their securities, all as set out in schedules annexed to the indenture. It further provided as follows:— "The said S.K.T. and T.A.R.M. are freed and discharged

from all responsibilities for all cases now pending in the District Court of Amherst and from all cases that may be brought hereafter by anyone in connection with the outstandings and securities hereby transferred and assigned." Thereafter S.K.T. acted as attorneys for N.R.M.A. in the administration suit. It may be explained that the administration suit was No. 21 of 1906 of the District Court of Thaton, which sits at Moulmein, the headquarters of the Amherst District, although variously described as the District Court of Moulmein or of Amherst.

On the 13th May, 1907, the District Court of Thaton made a decree in favour of S.K.T. for Rs. 67,023-1-6, but, on appeal to the Chief Court of Burma, the decree was set aside by the Chief Court on the 16th August, 1909, and an order made that S.K.T. should be struck out as parties to the suit. In a review of judgment, however, the Chief Court on the 2nd May, 1910, directed that the suit be remanded for making a preliminary decree and that S.K.T. be regarded as claimants under the said decree to be creditors of the estate and that their claims be taken to have been made on the 25th June, 1906. On the remand the District Court on the 14th August, 1911, passed a preliminary administration decree and, *inter alia,* ordered that an account be taken of all the liabilities of Vijayan Servai. Thereafter N.R.M.A. were made co-claimants with S.K.T. After the account had been taken, a decree was passed on the 17th November, 1919, declaring that Rs. 1,70,520-1-6 was due to N.R.M.A., the assignee of S.K.T., and directing the sale of the mortgaged properties, the mortgagees to be satisfied out of the proceeds.

Before the first decree of the District Court had been set aside by the Chief Court, R M.A.T., by an assignment, dated the 20th March, 1908, had transferred to the respondents A.M.K. *inter alia* "one-fourth share in the decree passed against V.V.R. Vijayan Servai in Civil Regular Suit No. 21 of 1906 of the District Court, Amherst, against which appeal is pending in Chief Court, Lower Burma." It is not now disputed that thereafter A.M.K. contributed their share of the expenses of S.K.T. and N.R.M.A. in the conduct of that case until 1909, and that on the 14th March, 1909, they received a sum of Rs. 1,379 from the Receiver in the suit, who was a member of the firm S.K.T.

In accordance with the decree of the 17th November, 1919, the property was put up to Court auction and was purchased by the appellants N.R.M.A. at the price of Rs. 1,00,060,

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which was set off against the decretal amount. The sale was completed and possession given to the appellants on the 24th June, 1920.

The administration suit is still pending, but on 19th September, 1923, the respondents instituted the present suit in the District Court of Thaton. The original plaint was amended and parties agreed to go to trial on the amended plaint, which is dated the 28th August, 1924. The relief sought was (1) a declaration that the respondents are the owners of an undivided quarter share of the lands purchased by N.R.M.A. in 1920, for partition of the lands and for an account of mesne profits, and (2) an account of the monies received by S.K.T. and N.R.M.A. as creditor claimants in the administration suit and an account of the expenses incurred therein.

By decree, dated the 4th May, 1926, the Trial Judge dismissed the suit with costs, but, on appeal, the High Court of Judicature at Rangoon by decree, dated the 18th May, 1927, upheld the respondents' claim for an account of a one-fourth share of the proceeds of the administration suit come to the hands of the appellants N.R.M.A., but rejected the respondents' claim to a share of the lands.

The appellants have taken the present appeal against the decree of the High Court, in regard to the proceeds of the administration suit, and the respondents have taken a cross-appeal in regard to the lands.

Three questions arise in the appeal, viz.:—

1. Whether the right, title and interest of R.M.A.T. in respect of their share in the joint advances is now vested in the respondents A.M.K. by virtue of the assignment of 20th March, 1908.

2. Is the suit barred by limitation?

3. Have the respondents a right of action against the appellants N.R.M.A.?

The cross-appeal raises the question whether the respondents A.M.K. are entitled to a one-fourth share of the lands purchased by the appellants N.R.M.A. in 1920.

On the first point their Lordships agree with the conclusion of the High Court. The appellants maintained that the instrument was not the transfer of an actionable claim under section 130 of the Transfer of Property Act, 1882, in view of the definition of "actionable claim" in section 3 of the same Act, in respect that the debt was secured by the mortgages and other securities. But R.M.A.T. was not a creditor in these securi-

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ties which were granted by V.S. to S.K.T., and R.M.A.T.'s only claim was against S.K.T. The appellants further maintained that by its terms, the instrument only assigned to A.M.K. the interest of R.M.A.T. in the actual decree of the 13th May, 1907, which was subsequently set aside. This was the view taken by the Trial Judge, but the High Court held this construction to be erroneous, and that the instrument transferred to A.M.K. all the interest of R.M.A.T. in any monies recovered by S.K.T. in the administration suit. Their Lordships concur in this view and for the reasons given by the High Court.

It will be more convenient to deal with the second contention last.

The third contention raises the question of the nature of the original right of R.M.A.T. as against S.K.T. The Trial Judge held that it was a partnership right which was not assignable by R.M.A.T. to the respondents, that the liability of S.K.T. was not transferred to the appellants by the assignment of the 26th September, 1906, and that there was no privity of contract between the respondents and the appellants such as to confer a right of suit. The High Court appear to have proceeded on the view that though there was originally a partnership between S.K.T. and R.M.A.T. that partnership had been dissolved and in its place "a new agreement had been entered into whereby the N.R.M.A. firm had the right to collect the debts but subject to the obligation to pay one-quarter of these debts to the A.M.K. firm".

The learned Judges state:

"It is true there is no contract here between the N.R M A. and the R M A T firms, but it seems to us clear that the parties have since accepted the position and have recognised that the N.R.M.A. firm are under an obligation to pay to the R M A T. firm, or their transferees in interest, a one-fourth share of what they have received"

After referring to the payments by and to the respondents A.M.K. in course of the administration suit, they further state:

"It would not appear that the plaintiffs have helped in the litigation since 1909, but it is sufficiently clear that their position as purchasers of R M A T.'s rights had been recognised by the N R.M.A. firm then It is in our opinion shown that there was a privity of contract between the plaintiffs and the N.R M.A. firm."

In the opinion of their Lordships there was not a partnership between S.K.T. and R.M.A.T. but they are of opinion that R. M. A. T. having provided a share of the

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moneys necessary to make the advances, had an equitable right to call S. K. T. to account for their share of the advances when recovered, and that on assignation by S. K. T. to N. R. M. A. in 1906 of Vijayan Servai's indebtedness and the securities, N.R.M.A. took subject to the equitable right of R.M.A.T. to claim an account, and that A.M.K. as assignees from R.M.A.T., are now entitled to claim an account.

As regards the question on the cross-appeal, their Lordships agree with the conclusion of both Courts below. The respondents A.M.K.—appellants in the cross-appeal—relied on section 258 of the Contract Act of 1872 and section 88 of the Trusts Act of 1882.

But the appellants N.R.M.A. were not partners of the respondents, and, as regards the Trusts Act, the respondents were unable to show that N.R.M.A. in purchasing the property, had availed themselves of their fiduciary relationship to A.M.K., or that their interests of N.R.M.A. in so doing, were adverse to the interests of A.M.K. The respondents A.M.K. were unable to show that the price paid by N.R.M.A. was not a proper one or that N.R.M.A. had not money or credit of their own sufficient to satisfy the price.

Finally, the question of limitation falls to be considered in relation to the respondents' claim for an account. Their Lordships agree with the appellants' contention that section 10 of the Limitation Act does not apply, as this is not a trust for a specific purpose. A specific purpose must be "a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed." *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*[1]. The appellants sought to apply Art. 62 of the Act, which applies to "money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." But, in their Lordships' opinion Art. 62 does not apply to an equitable claim against a trustee liable to account for an account and ascertainment of what may be due. (*Gooroo Das Pyne* v. *Ram Narain Sahoo*[2].) In their Lordships' view the case falls under Art. 120, under which the time begins to run when the right to sue accrues. In a recent decision of their

1 (1921) L.R. 49 I.A. 37 at 43: 30 M.L.T. 160 (P.C.)
2 (1884) L.R. 11 I.A. 59 at 65, I.L.R. 10 C 860 (P.C.).

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Lordships' Board, delivered by Sir Binod Mitter, in *Mt. Bolo* v. *Mt. Koklan*[3] it is stated, in reference to Art. 120:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

Counsel for the appellants admitted that he was unable to specify any date at which the claim to an account here in suit was denied by the appellants. Accordingly this contention fails.

It follows that their Lordships will humbly advise His Majesty that the appeal and cross-appeal should be dismissed, and, in respect that neither party has been successful, there will be no order as to costs except that, in accordance with the Order in Council of the 7th May, 1929, granting special leave to cross-appeal, the costs of the application for special leave to cross-appeal must be paid by the cross-appellants.

Solicitors for appellants: *Stoneham & Sons.*

Solicitor for respondents: *J. E. Lambert.*

K.J.R. *Appeal and Cross-appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD ATKIN, LORD MACMILLAN AND SIR JOHN WALLIS.

Dattatraya Krishna Rao Kane for himself and on behalf of the members of the Yeotmal Izardars' and Inamdars' Association .. *Appellant**

v.

The Secretary of State for India in Council .. *Respondent.*

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Dattatraya Krishna Rao v. The Secretary of State for India in Council.

Berar Tenancy Act, 1921—Validity—Effect of Act being to modify rights of tenure-holders—Power of Governor-General in Council under Indian Foreign Jurisdiction Order in Council—Tenancy Act whether opposed to Foreign Jurisdiction Act, 1890, S 12—Waste Land Rules, 1865—Nature and effect.

The plaintiff held certain lands in the Berar territory under sanads issued by the Government of India by virtue of the powers conferred on it under the Waste Land Rules, 1865. Under those rules the proprietor was to have full power to make his own arrangement for the cultivation of the village "subject to such rules and regulations as the Government of India may from time to time prescribe." The Governor-General in Council having passed the Berar Tenancy Act of 1921 by virtue of the powers

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*P.C. Appeal No. 51 of 1929 1st July, 1930.

3. (1930) 59 M.L.J. 621 (P.C.).

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under the Indian Foreign Jurisdiction Order in Council, the plaintiff brought a suit on behalf of himself and other Izardars and Inamdars to have it declared that the said Act was invalid because it purported to take away their rights under the sanads.

Held, that the Tenancy Act was a piece of legislation of a competent legislature and that it was effective to alter the rights of persons within the territory of Berar.

Held, further, that the validity of the Tenancy Act was not affected by S. 12 of the Foreign Jurisdiction Act, because it did not purport to affect His Majesty's subjects at all, but had relation to subjects of His Highness the Nizam of Hyderabad.

The Berar Waste Land Rules, 1865, are merely administrative rules and were not intended to be in the nature of legislation at all.

Decision of the Court of the Judicial Commissioner of the Central Provinces affirmed.

Appeal No. 51 of 1929 from a decree of the Court of the Judicial Commissioner of the Central Provinces, dated the 10th March, 1927, which affirmed a decree of the District Judge of Amraoti, dated the 23rd April, 1924.

The lands, the subject-matter of the proceedings, were situate in territory now known as the Berars or the "Hyderabad Assigned Districts." The plaintiff, joint owner of a village in the said territory, was permitted, for himself and on behalf of the Yeotmal Izardars' and Inamdars' Association, to institute the present suit to obtain a declaration as to the invalidity of the Berar Alienated Villages Tenancy Law, 1921. He prayed, amongst other reliefs, that the extension of the said Act to the villages set in proprietary title by the Waste Land Rules of 1865 be declared *ultra vires* of the Governor-General in Council as being repugnant to the said Rules, and that it be further declared that the rights of absolute ownership vested in the plaintiff and his joint owners do remain unaffected and unfettered notwithstanding anything to the contrary contained in the law of 1921. The plaintiff further asked for an injunction restraining the Government of India and the Government of the Central Provinces from putting into effect any of the provisions contained in the said Act of 1921.

The District Judge dismissed the suit and held that the Law of 1921 was an "Act of State" which placed it beyond the jurisdiction of the Civil Courts, which had no jurisdiction to declare it *ultra vires*. He further held that, assuming the Civil Courts had jurisdiction to enquire into the validity of the law, the said law was not *ultra vires* and that the Governor in Council of the Central Provinces was the Local Government within section 1 (3) of the Act and he had the power to declare it as coming into force from a particular date.

Against this judgment, the plaintiff preferred an appeal, which was dismissed by the Judicial Commissioners. The plaintiff thereupon appealed to His Majesty in Council.

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Dunne, K.C. and *Colombos* for appellant.—The territory of Berar is really a part of the Nizam's Dominions, and the Nizam is the Sovereign, though by treaty made with the British Government, the administration of the territory is in the hands of the British Government. Refers to the Order in Council made under the Foreign Jurisdiction Act.

Under the Waste Land Rules it was left to the landlord to make any arrangement he liked for the cultivation of the lands. The Act of 1921 deprived him of this right, and is consequently *ultra vires*. The Act is invalid also because it violates the provisions of S. 12 of the Foreign Jurisdiction Act, 1890. Reference was made to the decision in *Secretary of State for India* v. *Moment*[1].

De Gruyther, K.C. and *Wallach* for respondent.—The Governor-General in Council had the power to promulgate the Tenancy Act. It has not been shown that the Act is in any way inconsistent with any legislation of the Imperial Parliament. The fact that it takes away vested rights under sanads from Government does not affect its validity. The Act is not opposed to S. 12 of the Foreign Jurisdiction Act, 1890, because it applies to subjects of the Nizam and not to His Majesty's subjects.

The Courts in Berar are constituted under the Regulation, and it is somewhat anomalous that the present suit to declare the Act *ultra vires* should be brought in the very Court so constituted.

Colombos replied.

1st July, 1930. Their Lordships' judgment was delivered by

Lord Atkin.

Lord Atkin.—This action is brought by the plaintiff, on behalf of himself and other Izardars and Inamdars who hold land in the territory known as the Berar, against the Secretary of State for India in Council, to have it declared that the Act passed in 1921, which one may call shortly the Berar Tenancy Act, is invalid. It is said to be invalid because it is in conflict with and purports to take away rights which the plaintiff and those whom he represents allege were given to them by grant from the Government of India.

The position as it exists is due, in the first instance, to the treaties that were made between the Crown and His Highness

1. (1912) L.R. 40 I.A. 48: I.L.R. 40 C. 391: 24 M.L.J. 459 (P.C.).

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the Nizam of Hyderabad. The first treaty was made in 1853, and by the terms of that treaty His Highness the Nizam assigned the districts mentioned in the schedule, which include the territory of the Berar, to the exclusive management of the British Resident for the time being at Hyderabad, and to such other officers acting under his orders as might from time to time be appointed by the Government of India. That was for the purpose of paying the Hyderabad Contingent and certain other expenses. On the 26th November, 1860, a further treaty was made between Her Majesty Queen Victoria and His Highness the Nizam, by which the Nizam agreed to forego all demands for an account of the rents and expenditure of the assigned districts, and by Art. 6 it was provided as follows:—

> "The districts in Berar already assigned to the British Government under the Treaty of 1853, together with all the Surf-i-Khas talooks comprised therein, and such additional districts adjoining thereto as will suffice to make up a present annual gross revenue of thirty-two lakhs of rupees currency of the British Government, shall be held by the British Government in trust for the payment of the troops of the Hyderabad Contingent, Appa Dessaye's chout, the allowance to Mohiput Ram's family, and certain pensions mentioned in Art. VI of the said Treaty."

In 1902, however, a permanent arrangement was made between the Government of India and His Highness the Nizam. whereby His Highness the Nizam, whose sovereignty over the assigned districts was reaffirmed, leased them to the B[ritish] Government in perpetuity, in consideration of the paymen[t to] him by the British Government of the fixed and perpetual re[nt] of 25 lakhs of rupees. By clause (II) it is provided:

> "The British Government, while retaining the full and exclusive jurisdiction and authority in the Assigned Districts which they enjoy under the Treaties of 1853 and 1860, shall be at liberty, notwithstanding anything to the contrary in those Treaties, to administer the Assigned Districts in such manner as they may deem desirable."

In June, 1902, no doubt in anticipation of the agreement which was made and signed in November, 1902, there was an Order in Council made entitled: "The Indian (Foreign Jurisdiction) Order in Council," giving power to the Governor-General of India in Council to deal with these particular territories. Clause 3 of the Order provides:

> "The Governor-General of India in Council may, on His Majesty's behalf, exercise any power or jurisdiction which His Majesty or the Governor-General of India in Council for the time being has within the limits of this Order, and may delegate any such power or jurisdiction to any servant of the British Indian Government in such manner, and to such extent, as the Governor-General in Council from time to time thinks fit."

It was under that power that the Tenancy Law in question was promulgated, and it appears to their Lordships that,

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in pursuance of those powers so given to the Governor-General by Order in Council, he by this Tenancy Law purported to legislate and pass an enactment having the full effect of an Act in those territories, and the question is whether or not he had authority so to legislate. The power to make the Order in Council is derived from the Foreign Jurisdiction Act, 1890, which recites:

"Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of Her dominions,"

and proceeds to enact by section 1:

"It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

By the definition, "foreign country" means any country or place outside of Her Majesty's dominions, and the expression "jurisdiction" includes power. There can be no doubt at all that the King in Council has power, in respect of foreign territory within the definition of that clause, either to legislate himsel by Order in Council or to make provision for legislation by delegating that legislative authority to such a person or body as he may denote in the Order in Council. It is plain, in their Lordships' opinion, that the Order in Council of 1902 does purport to delegate to the Governor-General in Council the power to legislate in respect of the territories in question The Governor-General, therefore, in enacting this Tenancy Law of 1921, had the power to legislate; he exercised that power, and the legislation may operate, as all legislation may operate, subject to the terms of the Foreign Jurisdiction Act, to take away vested rights or to alter vested rights, of anyone who is in fact subject to that particular legislation.

The plaintiff in this case had in fact had dealings with the Government of India before this legislation was passed. There were certain Waste Land Rules which were made on the 13th December, 1865. It is not necessary to go through them in detail. The view that their Lordships take of those rules is that they are merely administrative rules, and were not intended to be in the nature of legislation at all. They lay down certain principles under which the Government of India would allow persons to hold land within the territory, and, in pursuance of those rules, certain leases were granted to the plain-

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tiff's predecessors-in-title and the predecessors-in-title of those whom he now represents. The leases were granted for thirty years, and, pursuant to the same rules, at the expiration of the leases the holders of the land were entitled to exercise the option of acquiring proprietary rights in the land which they held. Under those rules the proprietors were to have full power to make their own arrangements for the cultivation of the lands of the villages, "subject to such rules and regulations as the Government of India may from time to time prescribe for determining their relations with their *ryots* of any description."

In their Lordships' opinion, there cannot be any doubt that the provisions of the Tenancy Law which was passed do in fact interfere with the rights which the plaintiff and the persons whom he represents acquired over their own property under these sanads which were granted to them by the Crown, because the Tenancy Act incorporates most of the provisions with which we are familiar in the Bengal Tenancy Act and other Acts giving large powers to the Courts and administrative officers to protect the actual occupiers of the land, to give them security of tenure and to fix the sums which they have to pay, and undoubtedly interfere with the relations that previously existed between the principal proprietors and the actual occupiers of the land. To that extent, therefore, their rights are interfered with, but, inasmuch as, as has been said, the Tenancy Act is a piece of legislation of a competent legislature, in this case the Governor-General in Council, it is effective to alter the rights of persons within the territory, and it appears to their Lordships to be impossible to say that the Act is invalid merely on that ground.

The validity of the Act was also assailed on the ground that it violated the provisions of section 12 of the Foreign Jurisdiction Act, the Act which gave authority to make the Order in Council under which the Governor-General derives his legislative authority. That section provides:

"(1) If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country, or repugnant to any order or regulation made under the authority of any such Act of Parliament, or having in that country the force and effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be void."

It was said that the Waste Land Regulations were regulations which, within this section, control the operation of legisla-

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tion effected by the Governor-General. It appears to their Lordships that that is a misreading of the Foreign Jurisdiction Act. The Act of Parliament and the Order and Regulations referred to thereunder are Acts, Orders and Regulations so far only as they apply to His Majesty's subjects in the territory in question and have no relation to a case such as this, where the legislation does not purport to affect His Majesty's subjects at all but has relation to persons who are not subjects of His Majesty but subjects of His Highness the Nizam of Hyderabad. That seems to their Lordships to be quite sufficient to dispose of the claim in this case. That is the view which was taken by the learned Trial Judge, whose judgment on this part of the case seems to their Lordships to be completely satisfactory. There is a further point which has specially impressed the Appeal Court, namely, that the terms under which the plaintiffs themselves held their right expressly provide that they are subject to such regulations as may be made in future by the Government of India, that the provisions of the Berar Tenancy Act if not legislative would at any rate be regulations made by the Government of India, and that the plaintiffs, therefore, cannot complain. It is unnecessary to discuss this contention, for, in their Lordships' opinion, it is quite clear that this is legislation by a legislature which is competent to deal with existing rights and vary them. There is no provision in any Act which restricts the operation of that legislation, so far as any previous existing regulations are concerned, which the plaintiffs can invoke in aid of their title, and therefore it appears that the plaintiffs' action is ill-conceived and there is no ground for attacking the validity of the legislation in question. Therefore the suit fails and the appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice* AND MR. JUSTICE CURGENVEN.

Saradamba v. Pattabhiramayya.

Nanduri Saradamba .. *Appellant** (*Defendant*)

v.

Parakala Pattabhiramayya . *Respondent* (*Plaintiff*).

Contract Act (IX of 1872), Ss. 69, 70—Trespasser paying debts due by a deceased owner—Possession of property under a false title—Voluntary

*Appeal No. 225 of 1928. 14th February, 1930.

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payments to discharge debts enforceable against the property—Reimbursement—Proof of good faith in title—Whether necessary and how far—Evidence Act, Ss. 21, 63, 65 *and* 145—*Indian Limitation Act, Arts* 120 *and* 61.

The plaintiff gained possession of property under a false title and while so holding it claimed that he made several voluntary payments to discharge debts that would be enforceable against it, voluntary in the sense that those payments with one exception were not made to avert any imminent loss of property. On the question whether or not it is enough that the plaintiff should prove to entitle him to reimbursement that he believed in his own title,

Held, that before granting him a decree the Court must be satisfied that he had established unquestionable good faith in his own title and that in the absence of such an establishment of the requisite good faith, the plaintiff was disentitled from recovering in respect of payments that were voluntary and not affected by special considerations.

Case-law discussed.

Held, also, that the suit was within time under Art. 120 of the Limitation Act.

The statement of the plaintiff abstracted in the judgment in the will suit cannot be made use of in lieu of the original statement itself since, from S 63 of the Indian Evidence Act, such a record is not even secondary evidence of the statement and, even if it had been, the conditions laid down by S 65 for its use had not been fulfilled The deposition can be proved only by the production of the original or of a certified copy thereof and it can be used only to contradict a witness under S 145 or as an admission under S 21, and for the latter purpose it can be used as an admission that the will was genuine and not that it was a forgery.

Appeal against the decree of the Court of the Subordinate Judge of Narasapur, dated 28th February, 1927, in O.S. No 34 of 1926.

M Appa Rao, B. T. M. Raghavachari and *V. Viyyanna* for appellant.

S. Varadachariar and *V. Suryanarayana* for respondent.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J.—One Viyyanna died without issue in November, 1915, leaving a widow, Saradamba, who is the present defendant. Viyyanna's sister, Bayamma, upon his death took possession of his estate, which included about six acres of land, on behalf of her minor sons under a will alleged to have been executed in favour of the boys by Viyyanna on the 17th July, 1915. In O.S. No. 885 of 1920 on the file of the Principal District Munsif's Court, Tanuku, the widow sued for recovery of the property together with mesne profits on the ground that the will was a forgery, and obtained a decree on 6th February, 1922. Of Bayamma's sons, the elder, Lachanna, died during the suit and the younger brother is the present plaintiff. He has brought the suit, out of which this appeal arises, to

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recover from Viyyanna's estate in the defendant's hands a sum of Rs. 5,000 and odd on the ground that he paid this amount to Viyyanna's creditors while he and his brother were in possession of the estate. The payments alleged are four in number and further particulars of them will be found in the schedule attached to the plaint. The learned Subordinate Judge has found that the payments alleged are true and that, since the plaintiff made them in good faith, he is entitled to be reimbursed from the estate. The defendant appeals against a decree framed in these terms.

It is necessary in the first instance to decide what is the true foundation for a suit of this character, and in what circumstances, apart from the question of proof of the debts, the plaintiff can succeed. Mr. Varadachari for the plaintiff, now respondent, suggests that every suit for reimbursement of such payments falls into one of three categories:

(1) Where the person making the payment may be deemed to represent the estate, as in the case of a trustee or executor *de son tort;*

(2) Where the payment is necessary for the preservation of the property;

(3) Where the payment is made on behalf of the defendant and there is an implied contract for reimbursement. Suits of this character are provided for by sections 69 and 70 of the Contract Act.

He concedes that class (3) has no application to the present suit, and that class (2) will only apply where the debt is for instance a mortgage decree under which the sale of the property has to be averted. The claims, he argues, fall under class (1), the payments made being recoverable on the ground that the plaintiff made them as representing the estate. In order to make good this position, it is further admitted that the Court must be satisfied of the plaintiff's *bona fides,* embracing in that term not only his good faith in making the payments in the interests of the estate but also his belief in his own title to the estate. The question first arising therefore is whether that good faith may be presumed or has been proved.

Upon this point the case of the appellant is that, in the litigation by which the defendant recovered the property, it was found that the will was a forgery and that the plaintiff and his brother were privy to its fabrication. The respondent's case is that they were innocent instruments in the hands of others, or at least that there is no proof of their complicity. As a preliminary to the discussion of this matter, some questions relat-

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ing to the admissibility of evidence have to be decided. The judgment of the District Munsif in the will suit is Ex. II and the appellate judgment is Ex. S, and the appellant wishes to make use of certain of the contents of the former of these two judgments in order to show the plaintiff's guilty knowledge. For all that appears, the only object with which these judgments were filed was to prove the decision in the will suit, which of course is *res judicata* in the present proceedings. That this is so is probable from the circumstance that the learned Subordinate Judge refrained in his judgment from any reference to their further contents. Nor is there anything to show that in the Lower Court the defendant argued that those contents were admissible in evidence. Now, however, she wishes to use Ex. II as proof not only that the will is a forgery but that the 2nd defendant knew it. It is open to question whether this judgment, or the appellate judgment, is, strictly speaking, legal evidence even of the first of these propositions. The issue tried was "Whether the will set forth in the defendant's statement is true, valid and binding on the plaintiff," and it is clear that, speaking generally, a finding on an issue so framed, to give the plaintiff a decree, need not necessarily involve more than the conclusion that the will was not proved to be either true or false. The affirmative finding that it was false, clearly expressed by the District Munsif, less clearly by the Subordinate Judge, was not really necessary for the purposes of the decree. Inasmuch, however, as the question substantially between the parties was whether the will was true or false, it may be taken to have been settled between them that it was a forgery. It remains to be seen whether there is evidence that the plaintiff and his brother were privy to it. The plaintiff was examined as P.W. 2 in the suit but no effective questions were put to him in cross-examination under this head, a seemingly inexplicable omission on the part of the defendant's vakil. In particular, he was not questioned with reference to statements made by him as a witness in the prior litigation. That being the position, it is now sought to import into the present case not indeed his deposition in the will suit but an abridged version of it contained in the judgment, Ex. II. This version relates to the circumstances in which the rough draft of the will was alleged to have been prepared and, so far as appears, the plaintiff, as the 2nd defendant in that suit, deposed to these circumstances from first hand knowledge. We are clearly of opinion that no such use may be made of this extract. In the first place, the circumstances did not resemble

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those in *Gopu Nataraja Chetty* v. *Rajammal*[1], where the recital in a judgment of the terms of a codicil was allowed in proof of the contents of the document on the exceptional ground that it was admissible by consent of parties, no objection having been taken to its admission. As we have said, for all that appears, no attempt was made to use this portion of the judgment in this manner at the trial, so that the question of the unchallenged admission of legally inadmissible evidence does not arise. We have not been referred to any provision of the Evidence Act under which a statement of a witness abstracted in a judgment can be made use of in lieu of the original statement itself. Indeed, it seems clear from section 63 of that Act that such a record is not even secondary evidence of the statement and, even if it had been, the conditions laid down by section 65 for its use had not been fulfilled. We think, therefore, that if the defendant wanted to prove what the plaintiff had said as a witness in the will suit, she could have done so only by the production of the original deposition or of a certified copy. Apart, however, from this difficulty, it seems that the statement could have been used only in one of two ways—either under section 145 of the Evidence Act to contradict the witness or as an admission under section 21. For the former purpose, it was incumbent upon the party examining the witness, before proving the writing, to call his attention to those parts of it which were to be used for the purpose of contradicting him. It has been pointed out by the Judicial Committee in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*[2] that this is an essential step in the procedure, the omission of which is likely to cause grave injustice. In point of fact not only was his prior statement or even the version of it given in the judgment not put to the plaintiff but he was not asked a single question as to what he said. It may be that as an admission the original deposition might have been filed in evidence without putting it to the party, but, even assuming that the version in the judgment could be made use of in its place, it is clear that it would be an admission not that the will was a forgery but that it was genuine. We think then that it is not open to the appellant to make use of Exs. II and S, further than to show, at most, that the will was a forgery, in order to establish the plaintiff's lack of good faith. This seems to have been the view taken by both parties and the Court at the trial,

1 (1922) 43 M.L.J. 448.
2. (1915) L.R. 42 I.A. 135. I.L.R. 39 B 441: 29 M.L.J. 34 (P.C.).

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because the learned Subordinate Judge seems deliberately to have abstained from drawing any conclusions from the contents of those records. Had the vakil for the defendant obtained a copy of the deposition and cross-examined the plaintiff upon it, it may be that he would have been able to show from his answers that he must have known about the fabrication of the will; but it is even doubtful whether this conclusion should be drawn from what the plaintiff said in the prior suit, because it does not follow that because he gave false evidence in support of its genuineness he must have known that was a forgery. We think, accordingly, that the footing upon which the Subordinate Judge deals with the question of good faith in paragraph 12 of his judgment is correct in so far as he disregards the findings of fact in the previous suit and bases his conclusion in the plaintiff's favour merely upon the grounds that he and his brother Lachanna were minors at the time of Viyyanna's death and were not shown to have had any hand in bringing the will into existence. The question is whether, upon the evidence which we are entitled to consider, this is a correct conclusion.

We think it is clear from a variety of cases cited before us that, in order to qualify for a decree for reimbursement, the Court must be satisfied of the plaintiff's abundant good faith. In the Privy Council case, *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[3], the plaintiff enjoyed a period of possession under a decree of the High Court of Calcutta which was subsequently reversed by the judgment of the Privy Council. In the interval, although he received only a trifling sum on account of rents and profits, he was called upon to pay and did in fact pay large sums for Government revenue and other charges assessed upon the estate. In a suit to recover the amounts of these disbursements he obtained a decree which was reversed on appeal to the High Court. In further appeal to the Privy Council their Lordships said that

"it seems to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents."

They point out that in the interval between the High Court and the Privy Council decrees he was not in wrongful but in rightful possession. So much so that the defendants acted wrongfully when they in-

3. (1893) L.R. 20 I.A. 160: I.L.R. 21 C. 142 (P.C.)

terfered with the tenants upon the estate. The circumstances of that case were, we think, widely different from the present one. A person who gets possession of property under a forged will can in no sense be said to be in rightful possession; and in so far as their Lordships base their decision upon the danger to the estate which would have been involved by the plaintiff's refusal to pay the Government revenue, the case falls rather under Mr. Varadachari's second category. Here, in respect of at least the majority of the debts, the plaintiff cannot assert that payment was unavoidable in order to avert loss of the property. In another Privy Council case in the same volume *Abdul Wahid Khan* v. *Shaluka Bibi*[4], where one of two co-sharers who was in possession of the whole property was sued for the other half share and counter-claimed in respect of certain litigation expenses defrayed which, it was claimed, were necessary to protect the property, it was held that the mere circumstance that the plaintiffs had got a benefit therefrom was not a ground for making them liable for any portion of those costs:

"The proceedings were taken by the defendant for his own benefit, and without any authority express or implied from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs of the plaintiffs"

This case, it is true, does not deal with the question of *bona fides* and seems to have been decided with reference to the terms of section 69 of the Contract Act. Instances of cases where the claim has failed from lack of *bona fides* are *Chinna Alagumperumal Karayalar* v. *Vinayagathammal*[5], and, if we take the judgment of Devadoss, J., *Gopala Aiyangar* v. *Mummachi Reddiar*[6]. The learned Judge held that the plaintiff who took a conveyance of the property from the 1st defendant's vendee after the 1st defendant had warned him that the sale to the vendee was nominal was no better than a speculative volunteer and could not have made in good faith certain subsequent payments to the 1st defendant's creditors. This view was not agreed in by Spencer, J., who considered that the plaintiff could recover under sections 69 and 70 of the Contract Act, but it seems clear that, if the test of good faith should have any application, the plaintiff was out of Court. Special considerations, arising out of the repurchase of the property by the ostensible owner at a Court sale, were held by Kumara-

4 (1893) L R. 21 I.A 26 I L R. 21 C. 496 (P.C.).
5 (1928) 55 M L.J. 861. 6. (1922) 17 L.W. 254.

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swami Sastri, J., in *Mollaya Padayachi* v. *Krishnaswami Aiyar*[7] to qualify a mortgagee from that owner to a charge upon the property; but we think it is clear from the learned Judge's observations that in the absence of those circumstances he would have held that the knowledge of the mortgagee of the infirmity of his mortgagor's title would have been fatal to his claim.

A number of other cases have been cited before us by the learned Advocate for the appellant, but they do not, in our view, throw any further light upon the question before us, which is, indeed, a question to be answered upon general considerations of justice, equity and good conscience. The plaintiff gained possession of the property under a false title and while so holding it claims that he made several voluntary payments to discharge debts that would be enforceable against it, voluntary in the sense that the payments, with one exception, were not made to avert the imminent loss of the property. Whether or not it is enough that the plaintiff should prove, to entitle him to recover the money from the real owner, that he believed in his own title, it seems indisputable that before granting him a decree the Court must be satisfied that that condition was fulfilled. Unless he establishes the most unquestionable good faith he can have no claim in equity to reimbursement. Now it seems to us that, in view of the finding that the will is not genuine, which we must adopt here as *res judicata,* the only footing upon which the plaintiff can get the relief for which he asks is by avowing the falsity of the will, or at the least conceding that it is not genuine, and by pleading that he set up a title to Viyyanna's property, and paid the debts, in the relief that it was true. In the plaint, however, he adheres to the falsehood that the will is true, alleging in unqualified terms that it was executed by Viyyanna; and necessarily there is no disavowal of knowledge that the will was not genuine. He repeats in his deposition as P.W. 2 the story that Viyyanna executed the will. That being so, it seems scarcely open to him now to contend that he at least acted in ignorance that the will was false. The two positions are irreconcilable.

It may be objected that this line of reasoning is based upon too strict a standard of pleading and conduct; let us therefore see whether, in spite of the plaintiff's attitude, there are grounds upon which to infer his good faith. The learned Subordinate Judge thinks that as the plaintiff and his brother Lachanna were minors at the time of Viyyanna's death and as

7 (1924) 47 M.L.J. 622.

they were not shown to have had any hand in bringing the will into existence they should be held to have made the payments in good faith. The test proposed should be, we think, not whether or not they had a hand in the fabrication but whether at the time or within the period to which the payments relate they had knowledge that the will was false. It must in our opinion be inferred against an ordinary party who holds property under a false will that he has knowledge of the true state of affairs. How far, if it all, does the interference hold good in the case of a minor? To accept the mere fact of minority as sufficient to exonerate a person from the imputation of guilty knowledge is to go a great deal further than, for instance, the Indian Penal Code goes in section 83, under which a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, is to be deemed not to have committed an offence. Youthfulness, it is true, must always be taken into consideration in inferring knowledge and intention; but in this respect no hard and fast line can be drawn, we think, between persons above and persons below the age of eighteen.

The few facts which the evidence in this case discloses are these. The elder brother, Lachanna, is shown as of age when he executed the promissory note, Ex. B, on 14th November, 1915, a few months after the date of the will. The plaintiff himself gives his age, when he deposed in 1927, as 26. In the receipt, Ex. A, passed to his brother and himself on 28th January, 1918, he is no longer described as a minor with his mother as guardian. He was probably, therefore, about fifteen when Viyyanna died and the alleged will came into existence. It may perhaps be a fair inference that he was too young to bear a part in the fabrication of the will, although no such inference would arise, we think in the case of Lachanna. But confining ourselves to the real essential knowledge of the facts and remembering that the mother must be assumed to have known them, it appears to us impossible to draw the affirmative conclusion, on grounds of abstract probability that the two sons, who alone stood to gain by the fraud, would have been kept in ignorance of them. This part of the case is very difficult to deal with, owing to what we cannot but regard as its mishandling by the defendant's advisers. But that is no reason why the plaintiff should get a decree to which he is not entitled, and giving the matter the best consideration we can, we do not think that upon the record as it stands the requisite good

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faith has been established. This, in our view, disentitles the plaintiff from recovering in respect of any debts payment of which by him was voluntary and not affected by any special considerations.

It remains to apply these considerations to the four instances in which the plaintiff claims reimbursement for debts paid. Two of these items, Nos. 3 and 4, were debts upon promissory notes, and it is not claimed that payment of them was forced upon the plaintiff by immediate threat to any part of the property. The claims in respect of them, assuming them to be true, must accordingly be disallowed. Item 2 is a decree debt, in settlement of which the plaintiff and his brother are said to have paid Rs. 200 on 28th January, 1928 and obtained the receipt, Ex. A-1. In proof of this the plaintiff has examined the creditor himself as P.W. 1, and the writer and an attestor of the receipt, P.Ws. 6 and 5. The creditor says that the payment was entered in his accounts, but these were neither produced for the plaintiff nor summoned for by the defendant. Our attention is drawn to the circumstances that not only was the payment not certified to the Court, as the plaintiff says the creditor promised to do, but execution was actually taken out again subsequent to the date of Ex. A-1 (*vide* Exs. III and III-*a*). The creditor himself denies that he took this course, and it may be that, as suggested, it was done under his standing instructions which he failed to withdraw. Mr. Varadachariar points out that, in the earlier execution proceedings, the sale proclamation (Ex. A), is dated 8th January, 1918, and that it is reasonable to suppose that since no sale took place something must have been done to induce the creditor not to proceed; and that that makes it very probable that the payment was made on 28th January. As will be seen from para. 13 of the written statement, it is not the defendant's case that the decree was ever realised by execution, and in view of the positive evidence of payment, we agree with the Lower Court that it should be accepted as true. Since, further, when payment was made the sale was imminent, we think that here no question of good faith arises, but that the defendant is bound to honour an obligation incurred for the purpose of saving the estate.

Finally, there is item No. 1, which relates to a settlement of two debts due to one Rapaka Viyyanna under a mortgage and a decree respectively. The decree was for a sum of Rs. 1,278 on a promissory note and is dated 4th May, 1912. Execution of this decree was taken out in 1912 by warrants

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of arrest and for attachment of moveables, but nothing was realized; and the decree-holder subsequently assigned the decree to one Lakshminarayanamurthi. It has not been contended that in execution of this decree matters ever reached the stage of proclaiming any part of the estate for sale, much less that the payment was rendered unavoidable by the need to avert such a proceeding. We do not think that the mere fact that a debt is secured by a decree will render applicable the principle which we have accepted in the case of item No. 2. Even admitting, therefore, the truth of this payment, we do not consider that the amount can be recovered.

There remains the question whether upon any special considerations the plaintiff can claim refund of a payment of Rs. 1,593-6-6, assuming it to have been made, on the ground that the debt was under a mortgage secured upon the property. Our attention has been drawn to three cases decided by this Court, *Synnalarayudu* v. *Subbarayudu*[8], *Chama Swami* v. *Padala Ananda*[9] and *Palamalai Mudaliar* v. *The South Indian Export Company*[10] in which a claim of this kind was allowed, and it is argued that at least so far as title to the property was concerned the element of good faith was not deemed to be requisite. The first of these cases related to a sale found invalid as antedated to an agreement. The circumstances of the second do not appear in full, but it was a case of a sale found to be invalid. In the third, there was a sale which was set aside as in fraud of creditors. It will be observed that in each of these cases the plaintiff acted under colour of a sale deed, voidable no doubt but apparently supported by consideration, and occupied a position quite other than that of a mere trespasser. This distinction was stressed by Devadoss, J., in *Gopala Aiyangar* v. *Mummachi Reddiar*[6]. That, as has been already said, was a case of a purchaser whose vendor had, to the purchaser's knowledge, only a nominal sale deed in his favour, and who discharged certain encumbrances on the property. Spencer, J., considered that the payments fell within the terms of section 69 of the Contract Act, a contention which, as I have explained, is not advanced here. Devadoss, J., differed, and since it was clear that the plaintiff's object was to sustain his claim to the property, held that he did not make them *bona fide* for the purpose of preserving the property. He distinguishes between a person holding under a title voidable or de-

6 (1922) 17 L.W. 254

8 (1897) I.L.R. 21 M. 143

9. (1908) I.L.R. 31 M. 439: 18 M.L.J 306

10. (1909) I.L.R. 33 M. 334: 20 M.L.J. 211.

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feasible and a volunteer who knows that his so-called title is a mere sham. We must take it that the plaintiff's title in the present case is of this latter description. In *Narayana Kutti Goundan* v. *Pechiammal*[11] Sundara Aiyar, J., has discussed in what circumstances a person having no actual vested interest in the property—the case was one of a reversioner—may discharge a mortgage upon it, and on what principles he may recover the money. He decided that a reversioner is not entitled to be subrogated to the mortgagee's rights, and that he is not among the persons whom section 91 of the Transfer of Property Act permits to redeem. Finally, he held, that where the mortgagee held a decree under which he was proceeding to sell, and the reversioner intervened in order to save the property, he has sufficient interest in it to entitle him to a charge for repayment. The decision is based upon the interest possessed by the reversioner, and there can be little doubt from the learned Judge's observations that he would have held that no such relief could be granted to a holder under a false title. We have been referred to no authority for the view that, where the plaintiff's alleged title is found to have been false, and he has not succeeded in showing that he held possession of the property in good faith believing it to be true, a payment made to discharge a mortgage debt stands on any better footing than a payment made to discharge an unsecured debt. Nor do there seem to be any grounds based upon general principles of equity to make any such distinction. We must, therefore, disallow the claim in respect of the whole of item 1.

On the issue of limitation we agree with the learned Subordinate Judge that Art. 61 has no application but that the correct article is Art. 120, under which the suit was within time.

The result of our findings is that except as regards item 2, a claim to a sum of Rs. 200 and interest thereon as allowed by the Lower Court the appeal must be allowed and the plaintiff's suit dismissed. The appellant will get her costs throughout.

K.C. *Appeal allowed.*

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11. (1911) I.L.R. 36 M 426: 22 M L.J. 364.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Penugonda Venkataratnam and another .. *Petitioners**

v.

The Secretary of State for India in Council represented by the Collector of Kistna and others .. *Respondents.*

Venkataratnam *v.* The Secretary of State for India.

Certiorari—*Jurisdiction of High Court to issue writ—Nature and extent—Official acts of Governor acting with Ministers—Interference—Form of application for writ—Government of India Act, Ss* 106 (1) *and* 110.

A Union Board granted permission to a certain person to establish a rice mill within its jurisdiction The Collector suspended the resolution of the Board as the location of the mill was in his opinion detrimental to public health and his action was approved by the Local Government. Subsequently, however, the Government rescinded the previous order and thereupon certain residents of the locality, who alleged that they were prejudicially affected by the rescinding order, applied to the High Court to issue a writ of *certiorari* to the Minister of Public Health, to call for the records and pass proper orders. Objection having been taken on behalf of the Government to the form of the application and to the jurisdiction of the High Court to issue a writ of *certiorari,*

Held, that the application was wrong in form and that it ought to have been taken out against the Government of Madras, Ministry of Health, and not against the Minister of Public Health, Government of Madras

Question whether amendment of the petition can be allowed not decided.

Held, further, that because of Ss. 106 (1) and 110 of the Government of India Act, the High Court had no power to issue a writ of *certiorari* against the Local Government acting with Ministers in respect of their official acts and the petition should be dismissed on that ground.

The power to issue writs of *certiorari* falls within the "original jurisdiction" of the High Court as distinguished from its appellate or other jurisdictions.

Nature of the writ of *certiorari* described. Jurisdiction of the High Court in *certiorari* elaborately discussed

Per *Venkatasubba Rao, J*—The restrictive provisions, by which the jurisdiction of the High Court to issue writs of *certiorari* on the Governor and Council or Governor and Ministers is excluded, are relics of the past, the continuance of which is both unnecessary and useless, especially having regard to the new constitution

Petition under clauses 2 and 7 of the Letters Patent (Madras) and sections 106 and 107 of the Government of India Act praying that for the reasons stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* to the Honourable the Minister, Public Health

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*C.M.Ps. Nos. 2447 and 4277 of 1929. 20th December, 1929.

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(1) calling for the records in the matter of G.O. Mis. No. 673, Public Health, dated 11th March, 1929, cancelling G.O. No. 1214, Public Health, dated 9th June, 1928, and (2) to quash the proceedings in the said G.O. Mis. No. 673, Public Health, dated 11th March, 1929.

The facts of the case are fully set out in the judgments.

Sir C. P. Ramaswami Aiyar, P. Satyanarayana Rao and *G. Sivaramakrishna Sastri* for petitioners.—Both the orders of the Local Government are judicial acts inasmuch as a judicial procedure was adopted. As to the meaning of the expression "Judicial act" reference was made to the following cases: *Queen* v. *The Corporation of Dublin*[1], *per* May, C.J., Ex parte *Kingstown Commissioners*[2], *R. (Wexford C. C.)* v. *Local Government Board*,[3] *Sharp* v. *Wakefield*[4], *The Queen* v. *London County Council*[5], *Owners of Cargo on Board S. S. Waikato* v. *New Zealand Shipping Company*[6], *Reg.* v. *Nicholson*[7], *Reg* v. *Sunderland Justices*[8], *Reg* v. *Woodhouse*[9], *Rex* v. *Electricity Commissioners*,[10] *Frome United Breweries Co.* v. *Bath Justices*,[11] *Rex* v. *The Board of Education*[12] affirmed on appeal in *Board of Education* v. *Rice*[13], *Rex* v. *Minister of Health*[14], *Rex* v. *North Worcestershire Assessment Committee*[15] and *Rex* v. *Legislative Committee of the Church Assembly*.[16]

These cases also indicate the nature of the writ of *certiorari* and the jurisdiction of the superior Court over an inferior tribunal. Reference was also made in this connection to Halsbury's Laws of England, Vol. 10, pp. 161 and 171; Short and Mellor's Crown Practice, 2nd Edition, pp. 14, 81 and 82; English and Empire Digest, Vol. 16, p. 398 and American Encyclopædia, Vol. 6, pp. 742 and 745. The cases in In re *Mrs. Besant*[17] and *Besant* v. *The Advocate-General of Madras*[18] deal with executive acts. The power of the High Court to issue writs is recognised therein.

This is a proper case in which the writ of *certiorari* should be issued because the subsequent order of the Local Government rescinding its previous order is without jurisdiction. A statutory

1. (1878) 2 Ir. 371 at 376.
2. L.R. (1885) 16 Ir. 150 at 159.
3. (1902) 2 Ir. R. 348.
4. L.R. (1891) A.C. 173 at 174, 178, 179.
5. L.R. (1892) 1 Q.B. 190 at 195.
6. L.R. (1899) 1 Q.B. 56.
7. L.R. (1899) 2 Q.B. 455.
8. L.R. (1901) 2 K.B. 350 at 370, 371 (C.A.).
9. L.R. (1906) 2 K.B. 501 (C.A.).
10. L.R. (1924) 1 K.B. 171 at 190, 193, 204, 205 and 207.
11. L.R. (1926) A.C. 586 at 602
12. L.R. (1910) 2 K.B. 165.
13. L.R. (1911) A.C. 179.
14. L.R. (1929) 1 K.B. 619 at 626, 627.
15. L.R. (1929) 2 K.B. 397 at 405.
16. L.R. (1928) 1 K.B. 411.
17. (1916) I.L.R. 39 M. 1164: 32 M.L.J. 151.
18. (1919) L.R. 46 I.A. 176: I.L.R. 43 M. 146: 37 M.L.J. 139 (P.C.).

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body cannot review its decision unless such a power has been conferred by statute. Reliance was placed on the following cases: In re *St. Nazaire Company*[19], *Lala Prayag Lal* v. *Jai Narain Singh*[20], *David Nadar* v. *Gnanasambanda*[21] and *Anantharaju Shetty* v. *Appu Hegade*[22]. *Baijnath Ram Goenka* v. *Nand Kumar Singh*[23] affirmed on appeal in *Baijnath Ram Goenka* v. *Nand Kumar Singh*[24].

The original order having been made *permanently* the later order was illegal. To such a case the provisions of sections 13 and 15 of the General Clauses Act do not apply.

In *certiorari*, the High Court has the same unlimited jurisdiction as the Court of the King's Bench in England. Reference was made to the Letters Patents of 1800, 1862 and 1865, to section 9 of the Indian High Courts Act, 1861, and to section 106 of the Government of India Act, 1919. Reference was also made to the following cases: In the matter of *Ameer Khan*[25], *Nando Lal Bose* v. *Corporation of Calcutta*,[26] In re *Nataraja Aiyar*,[27] In re *Govinda Nair*,[28] *Lakshmanan Chetty* v. *Corporation of Madras*,[29] *Commissioner of Income-tax* v. *Krishna Aiyar and Sons*[30] and unreported judgment of Kumaraswami Sastri, J., in O.P. No. 276 of 1928. In England the writ is freely issued against the Government. Section 110 of the Government of India Act exempts the persons therein and not their acts. The power to issue writs appertains to the Judge of the High Court as such and is not part of any jurisdiction vested in the High Court. There is a distinction between the expression "High Court" in section 110 and the expression "Chief Judge and Judges of the Supreme Court" in clause (8) of the Letters Patent, 1800. A distinction is also maintained between the words "powers, jurisdictions and authorities". In issuing a writ the High Court is merely exercising a power. Reference was made to the following cases: In the matter of *Ameer Khan*[25], In re *Nataraja Aiyar*[27], *Besant* v. *Advocate-General of Madras*[18], In re *Kochunni Elaya Nair*[31] and In re *Govindan Nair*[28].

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18 (1919) L.R. 46 I.A 176. I.L.R. 43 M 146 at 157: 37 M.L.J 139 (P.C.)
19. (1879) 12 Ch. D 88. 20. (1895) I L.R. 22 C 419.
21. (1909) I.L.R. 33 M. 65: 19 M.L.J. 725
22 (1919) 37 M.L.J 162 at 164 23. (1907) I.L.R. 34 C 677
24. (1913) L.R 40 I A. 54· I.L R. 40 C. 552 (P.C.)
25 (1870) 6 Beng L.R. 392 at 437, 438.
26. (1885) I.L R. 11 C 275.
27. (1911) I.L R. 36 M 72 at 90, 93 23 M.L.J. 393.
28 (1922) I L.R. 45 M. 922: 43 M.L.J. 396 (F.B.).
29. (1926) I.L.R. 50 M 130: 51 M L J. 742 (F.B.).
30. (1928) 56 M.L.J. 151 (F.B.).
31 (1921) I.L.R. 45 M. 14: 41 M.L.J. 441.

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Assuming that the issuing of the writ is an exercise of jurisdiction, it is not an exercise of original jurisdiction as mentioned in section 110. Even in England the writ is issued only on the Crown side. The High Court in issuing the writ is merely exercising its powers of superintendence and correction. It is more like the revisional jurisdiction of the High Court which has been held to come under the appellate as contrasted with the original jurisdiction. See *Venkata Reddy* v. *Taylor*[32], *Chappan* v. *Moidin Kutti*[33] and *Secretary of State* v. *British India Steam Navigation Company*[34]. In dealing with the history and scope of sections 106 and 110, Government of India Act, reference was made to Strange's Notes of Madras cases, p. 53, *Collector of Sea Customs* v *Chidambaram,*[35] *Secretary of State* v. *Hari Bhanji,*[36] *Jehangir M. Cursetji* v. *Secretary of State,*[37] *Messrs Best & Co., Ltd.* v. *The Collector of Madras,*[38] *Chief Commissioner of Income-tax* v. *North Anantapur Gold Mines, Ltd.*[39] and *Alcock, Ashdown & Co.* v. *Chief Revenue Authority of Bombay.*[40]

A writ of *certiorari* is issued as a matter of course when applied for by the Crown. It is issued *ex debito justitiae* when applied for by a member of the public. A person specially aggrieved can apply. See *The King* v. *Taunton St. Mary*[41] and *The Queen* v. *Justices of Surrey*[42]. It has been held that even a rival trader can apply. As to the meaning of "person aggrieved" reference was made to the following cases:—*Rex* v. *Groom,*[43] *Rex* v. *West Suffolk Compensation Authority,*[44] *Rex* v. *Bedfordshire County Council*[45] and *Rex* v. *Richmond Confirming Authority.*[46] The existence of another remedy does not matter if the writ is the primary remedy. Reference was made in this connection to *White* v. *Steele*[47], *Rex* v. *North. Oakey*, Ex parte[48], *Sree Krishna Doss* v. *Chandook Chand*[49] and *Meenakshi* v. *Iswaram*[50]. The writ is the only appropriate remedy when the order of a statutory body is bad for want of jurisdiction.

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32 (1893) I.L R 17 M 100: 3 M.L.J. 259.
33 (1898) I.L.R. 22 M. 68· 8 M.L.J. 231 (F.B.)
34 (1911) 15 C W N 848 35 (1876) I L R. 1 M 89 (F B).
36 (1882) I.L.R. 5 M 273 37. (1902) I.L R. 27 B 189.
38 (1918) 35 M.L.J 23
39 (1921) I.L R. 44 M. 718 41 M.L J. 177
40 (1923) L.R. 50 I.A 227: I L.R 47 B 742· 45 M L.J. 592 (P.C).
41 (1815) 3 M & S 465: 105 E R. 685
42 (1870) L.R. 5 Q.B. 466 at 472
43 (1901) 2 K.B. 157 at 162
44 (1919) 2 K.B. 374 45. (1920) 2 K.B. 465
46. (1921) 1 K.B. 248
47. (1862) 12 C.B. (N S.) 383: 142 E.R. 1191 at 1202.
48 (1927) 1 K.B. 491
49. (1908) I.L.R 32 M 334· 19 M L.J. 307.
50 (1927) 53 M L.J. 903.

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The Government Pleader (*P. Venkataramana Rao*), *V. Govindarajachari*, *K. Venkatarama Raju*, *P. V. Rajamannar* and *B. T. M. Raghavachari* for respondents.—The High Court has no jurisdiction to issue a writ of *certiorari* against the Governor acting with Ministers in respect of their official acts. Reliance was placed on sections 106 (1) and 110 of the Government of India Act. The High Court has the same powers as the old Supreme Court, but the Supreme Court itself did not have the power to issue a writ of *certiorari* against the Government. In dealing with the power of the Supreme Court at Fort William reference was made to the East India Company Act, 1772, Letters Patent of 1774, and the East India Company Act, 1780. When the Supreme Court was constituted at Madras under the Government of India Act, 1800, it was placed on the same footing as the Court at Fort William. Clause (8) of the Letters Patent, 1800, is subject to the restrictive provisions in the Act of 1800. Section 9 of the High Courts Act, 1861, does not confer on the High Court any higher power than what the Supreme Court possessed. The Government of India Act merely enacts the pre-existing law. The exemption in favour of Governor and Council enures for the benefit of Governor and Ministers. Reliance was placed on section 31 of the General Clauses Act. Even otherwise, the grant of the writ will be without jurisdiction because a writ issued against the Governor and Ministers will really involve the exercise of jurisdiction against the Governor. In issuing writs of *certiorari* the High Court exercises original jurisdiction as contrasted with appellate jurisdiction. Even in England the writ is issued by the King's Bench only in the exercise of its original jurisdiction. Reliance was placed on Short and Mellor's Crown Practice, 2nd Ed., p. 14, Annual Practice, 1928, p. 1610 and Annual Practice, 1929, p. 2171. The High Court has consequently no power to issue a writ of *certiorari* against the Local Government.

Counsel was stopped.

P. Satyanarayana Rao replied.

The Court made the following

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ORDER. *Venkatasubba Rao, J.*—This is a rule calling upon "the Minister, Public Health, Government of Madras," to show cause why an order made by him on the 11th of March, 1929, should not be quashed on *certiorari*. The ground on which the rule was obtained may be shortly stated. The Nuzvid Union Board granted permission to a certain person to establish a rice mill within its jurisdiction. The Collector suspended the resolution of the Board, as, in his opinion, the establishment of a mill in the locality in question "was likely to be detrimental to public health". The Local Government passed proceedings under sections 38 and 196 of the Local Boards Act

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(1920), on the 9th of June, 1928, directing that the Collector's order "shall continue in force *permanently*". Subsequently this order was rescinded on the 11th of March, 1929, the result being that permission to establish the mill was accorded. This rule was issued at the instance of certain residents of the locality who complained that they were prejudicially affected by the order in question. The point of law raised by them is that the order impeached was one made without jurisdiction. They contend that there is no power of review enabling the Local Government to rescind its order purporting to be "permanent" under section 38.

The order was issued by "the Government, Ministry of Public Health."

Section 46 of the Government of India Act prescribes that the Presidency of Madras shall be governed, in relation to reserved subjects, by the Governor in Council, and, in relation to transferred subjects, by the Governor acting with Ministers. We are now concerned with a transferred subject.

Section 49 provides that orders and proceedings of the Government of a Governor's province shall be expressed to be made by the *Government of the province*. It further enacts that the Governor may make rules for the convenient transaction of business, in his Executive Council and with his Ministers. It says that every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the *Government of the province*.

It is clear from this, that the application made to us is wrong in form. Sir C. P. Ramaswami Aiyar, for this reason, asks us for leave to amend his petition, by substituting "The Government of Madras, Ministry of Local Self-Government" for the words "The Minister, Public Health, Government of Madras". I shall deal with the real substance of the issue, as if the amendment has been allowed.

Two main questions arise:

1. What is the jurisdiction of the High Court in *certiorari*?

2. Can *certiorari* issue against the Governor acting with Ministers?

As regards the first point, the nature of this writ is thus described in Short and Mellor's Crown Practice, 2nd Ed., page 14:

"The writ of *certiorari* is the process by which the King's Bench Division, in the exercise of its superintending power over inferior juris-

dictions, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below."

The Court of King's Bench (or Queen's Bench when a Queen is on the Throne), as the learned authors explain, derives its title from the fact that the Sovereign himself formerly sat in the Court. They then add:

"The theory of the Sovereign's presence has always been kept up . . . . . The jurisdiction of this Court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority. . . . . . It commands Magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition." (Page 2)

I am prepared to adopt and apply the law on this subject as laid down in the English books and decisions. It is unnecessary to deal with the numerous cases which Sir C. P. Ramaswami Aiyar has quoted. The law has been most succinctly stated in some of the most recent decisions on the point.

In *Frome United Breweries Co.* v. *Bath Justices*[1] Lord Atkinson quotes with approval the following passage from the judgment of May, C.J., in *The Queen* v. *Corporation of Dublin*[2]:

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

Similarly in *Rex* v. *Minister of Health*[3] Lord Hewart, C.J., cites with approval the following passage from the judgment of Atkin, L.J., in *Rex* v. *Electricity Commissioners*[4]:—

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The latest case on the point is *Rex* v. *North Worcestershire Assessment Committee*[5], and the law is admirably sum-

1. L.R. (1926) A.C. 586. 2. L.R. (1878) 2 Ir. 371.
3. (1929) 1 K.B. 619 at 627. 4. (1924) 1 K.B. 171 at 205.
5. (1929) 2 K.B. 397.

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med up in it, in regard to the powers of superior Courts to issue prerogative writs.

I may also refer to the observations of Brett, L.J., in *The Queen* v. *Local Government Board*[6]:

"I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to anybody of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

These various statements, with great respect, I adopt. Subject to the exception with which I shall deal, the High Court possesses the same jurisdiction in *certiorari* as the Court in England.

I shall now deal with the second point. Sir C. P. Ramaswami Aiyar contends that we possess the same unlimited jurisdiction in this respect as the Court of King's Bench. He relies mainly, if not solely, on clause 8 of the Letters Patent establishing the Supreme Court at Madras (dated the 26th December, 1800). It provides:

"And it is our further Will and Pleasure, that the said Chief Justice, and the said Puisne Justices shall, severally and respectively be, and they are all and every one of them hereby appointed to be, Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Fort St. George, and the Town of Madras, and the Limits thereof, and the Factories subordinate thereto, and all the Territories which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid; and to have such Jurisdiction and Authority as Our Justices of Our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain, called England, as far as circumstances will admit."

This clause consists of two parts and we are concerned with the second. By the first part, the Judges are appointed Conservators of the Peace and Coroners. The second part confers on them a distinct and independent jurisdiction. This is not merely ancillary to or explanatory of the first, but confers on the Judges a separate authority and jurisdiction. Mr. Justice Sundara Aiyar's construction in In re *Nataraja Aiyar*[7] seems, with all respect, forced and far-fetched. My view receives support from the judgment of Mr. Justice Sadasiva Aiyar in that case—

"The High Court has inherited the powers of the Supreme Court and if this clause stood alone, I should, on the strength of it, hold without

6. (1882) 10 Q.B.D. 309 at 321.
7. (1911) I.L.R. 36 M. 72: 23 M.L.J. 393.

hesitation that we possess jurisdiction in *certiorari*, as extensive as that possessed by the Court of King's Bench."

This leads me to examine certain Statutes and Charters to which the learned Government Pleader has drawn our attention. They preceded the Letters Patent to which I have referred and serve to explain the scope and effect of clause 8 of that Patent. The first Act, which is material in this connection, is the East India Company Act, 1772 (13 Geo. III, c. 63).

Section 13 enacted that it shall be lawful for His Majesty by Letters Patent to establish a Supreme Court of Judicature at Fort William, which Court shall have full power and authority to exercise all Civil, Criminal, Admiralty and Ecclesiastical Jurisdiction.

I may pass over section 14 and refer to sections 15 and 17 which alone impose certain restrictions in regard to the jurisdiction possessed by that Court.

Section 15 rendered the Governor-General and Members of his Council immune in respect of certain offences.

Section 17 exempted them and certain other high officers from arrest or imprisonment upon any action or proceeding in that Court.

These restrictions are not relevant to the matter in hand and the jurisdiction of the Supreme Court was not otherwise limited.

In pursuance of this Act, by a Letters Patent, dated the 25th of March, 1774, a Supreme Court was established at Calcutta with plenary powers. Into the conflict that arose in consequence between the Judges of that Court and the Executive Government, it is needless to enter. It was then thought desirable, in the interests of good administration, to limit the powers of the Court, and to secure that object the Act known as the East India Company Act, 1780 (21 Geo. III, c. 70) was next passed.

The preamble is instructive. After referring to the previous Act and the Letters Patent, it goes on to say that they led to dissensions between the Judges of the Supreme Court and the Governor-General and his Council. The result was disastrous. To use the very words—

"The minds of many inhabitants . . . . . have been disquieted with fears and apprehensions and further mischiefs may possibly ensue . . . . . . if a reasonable and suitable remedy be not provided."

It was therefore enacted—

"(1) That the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other

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matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor-General and Council.

(2) And . . if any person or persons shall be impleaded in any action or process, civil or criminal, in the said Supreme Court for any act or acts done by the order of the said Governor-General and Council in writing, he or they may plead the general issue, and give the said order in evidence; which said order, with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the said Court.

(3) Provided always, that with respect to such order or orders of the said Governor-General and Council as do or shall extend to any British subject or subjects, the said Court shall have and retain as full and competent jurisdiction as if this Act had never been made:

(4) Provided also, that nothing herein contained shall extend or be construed to extend to discharge or acquit the said Governor-General and Council, jointly or severally, or any other person or persons acting by or under their order, from any complaint, suit or process before any competent Court in this kingdom, or to give any other authority whatsoever to their acts than acts of the same nature and description had by the laws and statutes of this kingdom before this Act was made"

It is the first section that is now material. In regard to the matters specified, it totally removes the Governor-General and his Council from the jurisdiction of the Supreme Court.

What I have so far said pertains to the Supreme Court at Fort William. We must now turn to the Government of India Act, 1800 (39 and 40 Geo. III, c. 79). After reciting and referring to certain matters, it provides for the establishment of a Supreme Court at Madras. But that Court is to be, to quote the words of the Act—

"In the same form and with the same powers and authorities as that now subsisting . . . . at Fort William in Bengal."

The relevant part of what follows, I reproduce—

"(2) It shall be lawful for His Majesty . . . to establish a Supreme Court of Judicature at Madras . . with full power to exercise such jurisdictions . ... and to be invested with such power and authorities, privileges and immunities . and subject to the same limitations, restrictions and control within the said . . . Town of Madras and Territories dependent on the Government of Madras . . as the said Supreme Court of Judicature at Fort William in Bengal . . . is invested with or subject to within the said Fort William or the Kingdoms or provinces of Bengal, Bihar and Orissa:

(3) Provided always that the Governor and Council at Madras and the Governor-General of Fort William aforesaid shall enjoy the same exemption and no other, from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established."

Thus, in every respect, the two Courts were placed on the same footing, that is, the Court already existing and the Court to be established. The words used are direct and pointed. No higher powers can be conferred on the Supreme Court to be

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established, than those possessed by the Court at Fort William. The Governor and his Council are exempted from its jurisdiction in the same way, and to the same extent, as the Governor-General and his Council from the jurisdiction of the Calcutta Court.

Then we come to the Letters Patent establishing the Supreme Court at Madras, dated the 26th December, 1800. Clause 23 provides *inter alia*—

"nor shall it be competent for the said Court to hear or determine, or to entertain or exercise jurisdiction in any suit or action against the Governor-General of Fort William, or the Governor or any of the Council of the said Settlement, for or on account of any act or order, or any other act, matter or thing whatsoever, committed, ordered or done by them in their public capacity, or acting as Governor-General, or Governor and Council."

The limitation here mentioned, it may be said, is not quite as extensive as that in the Act itself, for in this clause, only suits or actions are mentioned, whereas the Act totally excludes all jurisdiction and authority. This is a detail which may be ignored, it being obvious that the powers of the Court as laid down in the Act cannot be enlarged by the Letters Patent issued under it.

Now let us go back to clause 8 of this Charter on which, as I have said, Sir C. P. Ramaswami Aiyar so strongly relies. It confers on the Judges of the Supreme Court at Madras the same jurisdiction as that possessed by the Judges of the Court of King's Bench. Perfectly true; but this clause is subject to the sections of the Act which controls the Charter. The position may be thus summed up. The Charter of the Calcutta Supreme Court gave that Court, as it were, unrestricted jurisdiction. It contained a provision, clause 4, in terms identical with clause 8 of the later Charter of the Madras Supreme Court. It said, in terms, that the Judges of the Supreme Court at Fort William shall have jurisdiction and authority as extensive as the Judges of the King's Bench Court in England. This led, as I have pointed out, to dissensions between the Judges of the Supreme Court at Fort William and the Executive Government. Thereupon, an Act was specially passed to curtail the powers of that Court. This history was not allowed to be repeated in the case of the Madras Supreme Court. An Act was first passed which defined the limits of the Court to be established. It was specially enacted that that Court was not to have any higher powers than those the Calcutta Court possessed after its powers had been curtailed. What is the result? Clause 4 of the Charter of the Calcutta Court was qualified by

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an Act passed subsequent to it, namely, the Act of 1780; whereas, clause 8 of the Charter of the Madras Court becomes restricted in its operation, by an Act which had been passed previous to it, namely, the Act of 1800.

I now pass on to the next stage. The Indian High Courts Act, 1861 (24 and 25 Vict., c. 104) was passed and gave to the Crown authority to establish High Courts in the Presidency Towns. It abolished the Supreme Courts and the Sudder Courts and provided for the jurisdiction and powers of the High Courts.

Section 9 runs thus:

"Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; *and save as by such Letters Patent may be otherwise directed* and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, *the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts*"

It is the second clause that is material for the present purpose. Each High Court, it says, shall have the jurisdiction and power vested in the abolished Courts at the time of their abolition. It is this provision that Sir C. P. Ramaswami Aiyar invokes in his favour. By virtue of it the High Court inherits the jurisdiction of the Supreme Court, but if the power contended for was not possessed by the Supreme Court itself, this clause cannot avail the applicant.

Having regard to the opening words of the clause referred to, the question arises: Have the Letters Patent "otherwise directed"? Far from it; they contain, in fact, no provision corresponding to clause 8 of the Charter of 1800. The High Court, therefore, derives its power to issue prerogative writs, not from any express clause in the Charter, but from section 9 of the Act, which preserves intact the powers of the abolished Courts. It follows, therefore, that the Letters Patent have not enlarged the jurisdiction of the High Court in *certiorari*. I may refer to the dictum of Mr. Justice Kernan that the provision relating to the exemption of the Governor and Members of Council is not affected by the High Courts Act of 1861, or

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the Letters Patent of 1865, *Collector of Sea Customs* v. *Chidambaram*[8].

Finally, the various High Courts Acts were repealed in their turn by the Government of India Act. Section 106 (1) enacts:

"The several High Courts are Courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the Court, and power to make rules for regulating the practice of the Court, as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as are vested in those Courts, respectively at the commencement of this Act."

This does not carry the matter further. The question ultimately resolves itself into: Did the Supreme Court possess the power in question? If yes, the High Court (having inherited its jurisdiction) has it. If not, it does not possess it.

It is said, by way of answer, that the Government of India Act has repealed the East India Company Act, 1780 (21 Geo. III, c. 70) and the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104). But this is utterly irrelevant, for, what matters for the present purpose whether they have been repealed or not? The repealed Acts serve merely to show what the powers of the abolished Courts were. We are not directly concerned with the Acts themselves.

It is next suggested that the exemption of the Governor-General and Council is subject to the proviso relating to British subjects (*see* the sections of 21 Geo. III, c. 70, quoted above). The argument is thus put: Since the passing of the Government of India Act, 1858, natives of British India are British subjects (*see* Halsbury's Laws of England, Vol. X, page 588) and the order complained against affects the rights of such subjects and therefore the immunity claimed does not extend to it. The short answer is, that the proviso has no bearing on the section which relates to the exemption in question. That proviso (unlike the succeeding one) refers to matters dealt with in section 2 and not in section 1.

Then comes the question, does the exception by statute in favour of "the Governor and Council" enure to the benefit of "the Governor acting with Ministers"? The Act says: "The Governor and Council shall enjoy the same exemption as is enjoyed by the Governor-General and Council" (section 3 of 39 and 40 Geo. III, c. 79 already quoted). And what is the ex-

8. (1876) I.L.R. 1 M 89 (F.B.)

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emption that the latter enjoy? The Statute of 1780 provides that they are exempted jointly and severally. The Governor is thus individually not amenable for acts done in his official capacity. As granting the writ against "the Governor acting with Ministers" involves the exercise of jurisdiction against the Governor himself, it follows, that we must even as against that body, refuse to issue *certiorari*. To this subject I shall return when dealing with an allied argument in connection with section 110 of the Government of India Act.

The learned Government Pleader relies upon section 31 of the General Clauses Act (X of 1897) for construing the expression "The Governor and Council" as including "the Governor acting with Ministers." It provides (omitting words not material):

"In any enactment made by any authority in British India before the date on which section 3 of the Government of India Act, 1919, comes into operation . any reference by whatever form of words to an authority, authorised by law, . . to administer executive Government . shall, where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed . as a reference to such new authority."

This was added to the General Clauses Act by Act XXXI of 1920. Are the requirements of this section fulfilled? First, the enactment in question (the Government of India Act, 1800) was made before the date specified in the section. Secondly, was it made by an authority in British India? Is this to be confined as contended for by the applicant to an authority *situated* in British India? I see no reason to limit it in that way. The word "authority" according to Webster's Dictionary may mean a body exercising power. Substituting those words, the section reads thus:

"In any enactment made by anybody exercising power in British India."

The British Parliament being such a body, the enactment in question answers this description. Is the Indian Legislature then competent to provide for the interpretation of words occurring in an Act of Parliament? Having regard to the fact that the Act in which the expression occurs is a repealed one and having advertence to the rule embodied in section 65 of the Government of India Act, I am disposed to think that we can call in aid section 31, in construing the words in the Act of 1800. In that case, what is the new Executive Authority which corresponds to the "Governor and Council" of 1800? Section 46 of the Government of India Act (already quoted) says that each Presidency shall be governed, in relation to

reserved subjects, by a Governor in Council and, in relation to transferred subjects, by the Governor acting with Ministers. The authority with which we are now concerned is the Governor acting with Ministers and therefore the exemption extends to that body. But this was the conclusion at which I arrived also on another (and in my opinion safer) ground.

I now proceed to deal with the next contention of the Government Pleader, that section 110 of the Government of India Act also excludes our jurisdiction. This is pleaded in the alternative as the second ground. The relevant part of that section runs thus:

"The Governor-General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the Executive Council of the Governor-General or of a Governor or Lieutenant-Governor, and a Minister appointed under this Act shall not—

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction;"

In the first place, the question arises, if exemption otherwise exists (as I have held it does), why was section 110 enacted at all? Mr. Rajamannar's argument seems plausible; he says by section 9 of the High Courts Act of 1861 (already quoted), the Court was invested with two distinct jurisdictions: first, jurisdiction of the abolished Court (second clause) and, secondly, jurisdiction freshly conferred (first clause). The old jurisdiction was excluded in the manner already stated. How was exemption to be obtained from the jurisdiction newly conferred? This was secured by the enacting of section 110. Then another difficulty presents itself, why was this exclusion restricted to the original jurisdiction? I do not think it necessary to refer to the answer attempted. The fact remains, that Governors and Ministers are declared not amenable to the original jurisdiction of the High Court in respect of their official acts. Then is the jurisdiction in *certiorari* original? I think the question must be answered in the affirmative. By section 34 of the Judicature Act of 1873 (corresponding to section 55 of the present Act of 1925) to the Queen's Bench Division of the High Court were assigned—

"All causes and matters . . which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction."

This is explained thus in the "Supreme Court Practice":

"Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of

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this Act included the supervision of decisions of inferior tribunals generally by *certiorari*."—*See* the Supreme Court Practice, 1928, page 1610

I must guard myself against being understood that the term "Original Jurisdiction" in this context connotes that the writ cannot be issued outside the limits of the City. This is not the sense in which that expression is used. The jurisdiction in the exercise of which the writ is granted is original, as contrasted with appellate. This jurisdiction termed "original" is not to be confused with "original civil jurisdiction" mentioned in section 12 of the Letters Patent. The last mentioned jurisdiction can be exercised by its very nature, within certain local limits. But the jurisdiction possessed by the High Court in the matter of *certiorari* is supervisory or corrective and, on the English analogy, extends over all inferior tribunals amenable to its authority.

Again, under this section, a difficulty arises similar to the one I have already noticed. A Governor is exempted, so is a Minister, but there is no exemption in favour of "the Governor acting with Ministers". I may point to a similar lacuna in the section even in the case of "the Governor in Council," for, while it mentions both the Governor and the Members, it does not in terms refer to "the Governor in Council". Reading the section strictly, the Governor is exempted, so are the Members and the Ministers. But this exemption does not extend to "the Governor in Council" or the "Governor acting with Ministers". We must construe the section reasonably. If each of these individuals enjoy immunity in respect of his public acts, it stands to reason that they should likewise be exempt when acting jointly.

I am, therefore, constrained to hold that our jurisdiction is excluded. The restrictive provisions, which drive us to this conclusion, are mere relics of the past, dating back to the discord of the Supreme Court and the Governor-General's Council—*see* Supplement to the Government of India, by Ilbert, (1916), page 154. In the words of Kernan, J., in respect of an allied matter in *Collector of Sea Customs* v. *Chidambaram*,[8] already quoted, the continuance of these exceptions, is both unnecessary and useless. These remarks apply with greater force at the present day, having regard to the new constitution.

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8. (1876) I.L.R. 1 M. 89 (F.B.).

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In England, as shown by the numerous cases cited at the Bar, prerogative writs lie to the Government in its various departments. I see no reason for retaining the restrictive provisions in regard to the High Courts in India. It is, however, our duty to give effect to the law as we find it. I must, therefore, refuse to make the rule *nisi* absolute. The application is dismissed with costs (two sets). We must fix a special fee, but we cannot penalise the petitioner by ordering him to pay a sum adequate to the importance of the case and the time it has taken. Accordingly, we fix the fee of the Government at Rs. 350 and the other respondent's costs at Rs. 75.

The petitioners will pay Rs. 350 to the 3rd respondent and Rs. 75 to the 4th respondent for their respective costs in this petition.

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Madhavan Nair, J.—C. M. P. No. 2447 *of* 1929.—In this application directed against (1) the Secretary of State for India in Council, (2) the Honourable the Minister of Public Health, the Government of Madras, (3) the Secretary for Public Health, Government of Madras, and (4) Vezzu Venkata Narasimham of Nuzvid, the petitioners request this Court to issue a writ of *certiorari* to the Honourable the Minister, Public Health, calling for the records in the matter of G.O. No. Mis. 673, P.H., dated 11th March, 1929, cancelling G.O. No. Mis. 1214, P.H., dated 9th June, 1928, to quash the said proceedings and to pass such order or orders as this Court may deem fit.

Local Self-Government Department, G.O. No. Mis. 1214, P.H., dated 9th June, 1928, was passed in the following circumstances. By its resolution No. 71, dated 20th January, 1928, the Nuzvid Union Board granted permission to the 4th respondent to establish a rice mill against the advice of the District Health Officer, Kistna, who considered it most undesirable as the site was in the midst of dwelling houses and on a busy thoroughfare and in the heart of the town. The Collector, in his proceedings, dated 10th February, 1928, suspended the Union Board's resolution as, in his opinion, the establishment of a mill in the locality was likely to be detrimental to the public health. The Union Board was given an opportunity to show cause why the Collector's order should not be made to continue in force permanently. The Government were not impressed with the arguments of the Union Board; and they concurred with the Collector that the establishment of a mill in the heart of the town should not, in the interests of public health,

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be agreed to. Narrating these circumstances, the order ended as follows:—

"In exercise of the powers conferred on them by sub-section (2) of sections 38 and 196 of the Madras Local Boards Act, 1920, they accordingly direct that the Collector's order contained in his proceedings, dated 10th February, 1928, shall continue in force permanently and the permission is cancelled

(By order of the Government, Ministry of Public Health.)

(Sd.) C.W.E. COTTON,

Secretary to Government."

The above order was subsequently rescinded by the Government by Local Self-Government (Public Health) Department, G.O. No. Mis. 673, P.H., dated 11th March, 1929, which this Court is now called upon to quash by the issue of a writ of *certiorari*. After mentioning in the first paragraph that the Government in G.O. No. Mis. 1214, P.H., dated 9th June, 1928, the G.O. already quoted, directed that the Collector's order suspending the resolution of the Nuzvid Union Board, No. 71, dated 20th January, 1928, should continue in force permanently, the G.O. proceeds as follows:—

"Affidavits have now been filed by the residents of Nuzvid in respect of the working of the mill in question and the Government have after a careful consideration thereof come to the conclusion that the existence of the mill at its present site is not likely to cause danger to life, health or safety of the residents of the locality. In supersession of the orders contained in G.O. No. 1214, P.H., dated 9th June, 1928, they accordingly rescind the proceedings of the Collector No R.O.C. B-3, 362-28, dated 10th February, 1928, suspending the resolution of the Union Board referred to above

(By order of the Government, Ministry of Public Health.)

(Sd.) S. RANGANATHAN,

Deputy Secretary to Government."

A rule *nisi* was issued by this Court calling upon the Honourable the Minister of Public Health for the records in the matter of these Government Orders for quashing the said proceedings.

At the time of the final hearing of the rule, the petitioners' learned counsel filed an amended application for the issue of the writ in which "the Government of Madras, Ministry of Public Health" is substituted for "The Honourable the Minister of Public Health".

On behalf of the Government, the learned Government Pleader takes a preliminary objection that an application will not lie under the Government of India Act against the Honourable the Minister of Public Health, Government of Madras, and that the amendment asked for directing the fresh application against the Government of Madras, Ministry of Public Health, should not be allowed at this late stage. He next argues that

this Court has no jurisdiction to issue a writ of *certiorari* against the Minister or the Government of Madras, Ministry of Public Health, and that in any event, having regard to the circumstances of this case, the writ of *certiorari* asked for should not be issued. All these points are disputed by the learned counsel for the petitioners. The three main questions arising for consideration are: (1) Should the preliminary objection be upheld? (2) Has this Court jurisdiction to issue a writ of *certiorari* against the Minister or the Government of Madras, Ministry of Public Health? and (3) If it has such jurisdiction should a writ be granted to the petitioners in the present case? I shall deal with these questions one after the other.

(1) The Preliminary Objection—

In these proceedings action has been taken by the Local Government under section 38, clause 2 of the Madras Local Boards Act, 1920. It empowers the District Collector to suspend the resolution of any Local Board under certain circumstances :

"and report to the Local Government, who may thereupon either rescind the Collector's order or after giving the Local Board and, if the order affected any act of the President, the President also, a reasonable opportunity of explanation, direct that it continue in force with or without modification permanently or for such period as they think fit."

Under section 134, clause (4) of the Government of India Act—

"'Local Government' means in the case of a Governor's province, the Governor in Council or the Governor acting with Ministers (as the case may require). . . ."

This definition epitomizes the substance of section 46 of the Act which is as follows:—

"The Presidencies of Fort William in Bengal, Fort St. George, and Bombay . . . . shall each be governed, in relation to reserved subjects, by a Governor in Council, and in relation to transferred subjects (save as otherwise provided by this Act) by the Governor acting with Ministers appointed under this Act"

The two limbs of the Local Government are the Governor in Council in relation to reserved subjects and the Governor acting with Ministers in relation to transferred subjects. The subject-matter of the Government orders in the present proceedings admittedly falls within the category of transferred subjects, and as such, the Local Government's order under section 38, clause 2 of the Local Boards Act will be made by the Governor acting with the Minister in charge of this particular subject.

Having regard to these provisions it is clear that the application for the writ should not have been directed against the Honourable the Minister of Public Health, Government of

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Madras. This is conceded by the petitioners. In strict propriety, the application should have been directed against the Governor of Madras acting with the Minister in charge of this particular subject. Section 49 (1) enacts that

"All orders . . . . of the Government of a Governor's Province (such as Madras, Bombay, etc) shall be expressed to be made by the Government of the Province, and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

"Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the Province."

Clause 2 enacts:

"The Governor may make rules and orders for the more convenient transaction of business . with his Ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the Government of the province"

Obviously, it must have been according to the rules made under this section that the order in this case has been issued in the following form:—

"By order of the Government, Ministry of Public Health."

The expression "Ministry of Public Health" does not find a place in the Government of India Act; but rules must have been made under section 49 which authorise the Governor acting with the Minister of Public Health being described as the "Ministry of Public Health." This, I think, is the explanation for the expression "The Ministry of Public Health" being found in the order of the Government. So, if the application for the issue of a writ was directed against the Government of Madras, Ministry of Public Health, the application according to the provisions of the Statute would have certainly been in proper form.

The learned Government Pleader argues that the application to be in proper form should be directed against the Governor. His argument is mainly based on section 52, clauses 1 and 3 of the Government of India Act. Under clause 1 the Governor may appoint Ministers and any Minister so appointed shall hold office during his pleasure. Clause 3 enacts that—

"In relation to transferred subjects, the Governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice:

"Provided that rules may be made under this Act for the temporary administration of a transferred subject where in cases of emergency, owing to a vacancy, there is no Minister in charge of the subject, by such authority and in such manner as may be prescribed by the rules"

It is argued that, since the Ministers offer only advice which may be discarded by the Governor and since he can

administer the departments himself without Ministers in cases of emergency, the orders passed by the Government in relation to transferred subjects are really orders of the Governor and, as such, if they are sought to be questioned by writs of *certiorari*, the writs should be directed against the Governor. The point is sought to be further emphasized by reference to section 47 (1) of the Act which deals with Members of the Governor's Executive Council and section 50 (1) which deals with the procedure in case of difference of opinion in Executive Council. The argument cannot be accepted. Under section 46, clause 1, the Presidency of Madras is governed in relation to transferred subjects by the Governor acting with Ministers. Whether their advice is followed or not, the orders passed in relation to transferred subjects are orders of the Governor acting with Ministers and when the orders passed by this statutory body are sought to be challenged by writs of *certiorari*, it is clear that the application for the writs should be directed against that body and against none else. I have shown that, having regard to the rule-making power contained in section 49 (1), the application would be in proper form if directed against the Government of Madras, Ministry of Public Health. As this has not been done in the present case, is the application to be dismissed? I think not; and this, apart from the question of amendment asked for at this hearing. The recipient of the notice knew exactly the scope of the application against which he was asked to show cause. He knew, by the receipt of the petition and the affidavit annexed to it, that the Court was being moved to issue a writ of *certiorari* calling for the records in the matter of G O. Mis. No. 673, P.H., dated 11th March, 1929, cancelling G.O. No. 1214, P.H., dated 9th June, 1928, and for quashing the said proceedings. On his attention being drawn to the matter of these Government orders, it must have become clear to him that the proceedings were directed against the orders passed by the Local Government, that is, the Governor acting with the Minister of Public Health, that is, the Government of Madras, Ministry of Public Health In this view, the application may be considered to have been directed against the proper department of the Government of Madras. Therefore the objection that the petition should be dismissed as it was directed against the Honourable the Minister of Public Health, Government of Madras, has no substance in it and is overruled. This dispenses with the necessity to consider the question whether the amendment asked for may be allowed at this stage.

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(2) Has the High Court jurisdiction to issue the writ?

The next question for consideration is whether the High Court has jurisdiction to issue a writ of *certiorari* against the Government acting with the Minister of Public Health or the Ministry of Public Health as the department is now called. The learned Government Pleader argues that it has no such jurisdiction relying on sections 106 (1) and 110 of the Government of India Act under each of which, he states, that the Government can claim exemption. Generally stated, his argument is that, while the High Court has jurisdiction to issue writs of *certiorari* against Courts or persons entrusted with judicial functions [In re *Nataraja Aiyar*,[7] In re *Mrs. Besant*[8] and *Besant* v. *Advocate-General of Madras*[10]] "the Governor acting with Ministers" is exempt from its jurisdiction "by reason of anything counselled, ordered or done" by that body in its "public capacity".

I shall first deal with section 106 (1) of the Government of India Act, the relevant provisions of which are as follows:—

"The several High Courts . . . have such jurisdiction . . . and all such powers and authority . . as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act"

In finding out the present jurisdiction of the High Court we have, therefore, to inquire into the jurisdiction, power and authority vested in it at the commencement of the Act. This requires examination of the various Letters Patents relating to the High Court and of the powers of the Supreme Court.

This High Court was established by 24 and 25 Vict., c. 104, known as the High Courts' Charter Act. Section 9 of that Act provided that—

"The High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts"

By section 8 of that Act, the old "Supreme Court" and the Courts of Sudder Dewany Adawlat and Foujdary Adawlat were abolished. The High Court thus inherited the jurisdiction and all the powers of the old Supreme Court. These powers were continued in the Court under 28 and 29 Vict, c. 15. The Letters Patent issued with reference to this statute re-enacted the powers already given and stated that the powers hitherto exercised "before the publication of these presents" shall vest

7 (1911) I L.R. 36 M 72: 23 M.L.J. 393.

8 (1916) I L.R. 39 M 1164: 32 M.L.J. 151

9. (1919) L.R. 46 I.A. 176: I.L.R. 43 M 146: 37 M.L.J. 139 (P.C.).

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in the High Court (*see* section 17). Then came the Government of India Act which dealt with the jurisdiction of the High Court in section 106, clause 1, already referred to. It is thus apparent that the High Court at the present day, in exercising all the powers it has under the Statutes we have referred to, exercises, amongst all such powers, all the powers of the old Supreme Court; and when we examine what powers the Supreme Court had, it will be discovered that it had no jurisdiction over the Governor and Council jointly or severally for acts done or orders issued by them in their public capacity.

The Government of India Act of 1800 (39 and 40 Geo. III, c. 79), by virtue of which the Supreme Court at Madras was established, by clauses 2 and 3 enacted that a Supreme Court may be established at Madras with the same powers and authorities as the Supreme Court at Calcutta and that the Governor and Council shall enjoy the same exemption, and no other, from the authority of the Supreme Court, as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta. The 4th and 5th paragraphs of sections 2 and 3, where the exemption of the Governor and Council is specifically referred to, are as follows:—

Section 2, paragraph 4.—"And whereas it may be expedient for the better administration of justice in the said settlement of Madras, that a Supreme Court of Judicature should be established at Madras, in the same form and with the same powers and authorities as that now subsisting by virtue of the several Acts before mentioned at Fort William in Bengal."

Section 2, paragraph 5—"Be it therefore enacted, that it shall and may be lawful for His Majesty to erect and establish a Supreme Court of Judicature at Madras aforesaid, ... with full power to exercise such civil, criminal, admiralty and ecclesiastical jurisdictions, . . and to be invested with such power and authorities, privileges and immunities, ... and subject to the same limitations, restrictions and control within the said Fort St George . . . as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed, or by this present Act, doth consist of, is invested with or subject to, within the said Fort William or the Kingdoms or Provinces of Bengal, Behar and Orissa."

Section 3—"Provided always that the Governor and Council at Madras and the Governor-General at Fort William aforesaid shall enjoy the same exemption and no other, from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established."

As this Act specifically grants to the Governor and Council at Madras "the same exemption and no other" from the jurisdiction of the Supreme Court to be established as is enjoyed by the Governor-General and Council at Fort William,

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it becomes necessary to refer to the powers and authorities vested in the Supreme Court at Calcutta to find out the exact nature of the exemption that is granted to the Governor and Council. To anticipate a little, this will show the interesting fact that, unlike the Supreme Court at Calcutta about the jurisdiction of which over the Governor-General and Council there were "many doubts and difficulties," the Supreme Court at Madras from its very origin had clearly no jurisdiction over the Governor and Council.

The East India Company Act, 1772, commonly known as the Regulating Act (13 Geo. III, c. 63) authorised His Majesty by Charter and Letters Patent to erect and establish a Supreme Court at Calcutta (*see* section 13). This Act was followed by the grant of the Charter, dated the 26th of September, 1774, establishing the Supreme Court, which, briefly stated, invested that Court within Bengal, Behar and Orissa with such jurisdiction and authority as the Court of the King's Bench exercised in England (*see* clause 4). Then came the historic struggle between the Governor-General and Council and the Supreme Court which led to the passing of 21 Geo. III, c. 70 (East India Company Act of 1780). By section 1 it is enacted—

"that the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor-General and Council."

Section 2 enacts that

" . . . for any act or acts done by the order of the said Governor-General and Council in writing, ... which said order, with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the said Court."

These provisions show that the Supreme Court at Calcutta had, *in the year* 1800, *when the Supreme Court at Madras was established,* no jurisdiction over the Governor-General and Council of Bengal jointly or severally "for or by reason of any act or order or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only and acting as Governor-General and Council" as mentioned in section 1; and also over persons for any act or acts done by them under the authority of the Governor-General and Council. In this connection reference may usefully be made to In the

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matter of *Ameer Khan*[11] by way of illustration to show what effect was given to section 2 by the Calcutta High Court which inherited the limited jurisdiction of the Supreme Court by 24 and 25 Vict., c. 104. In that case, a Muhammadan subject of the Crown was arrested in Calcutta and taken to the mufassal and detained in jail under a warrant of the Governor-General and Council in the form prescribed by Regulation III of 1818 and an application was made to the High Court to issue a writ of *habeas corpus* to the superintendent (a European British subject) of the jail. It was held that the Supreme Court had power to issue writs of *habeas corpus* to persons in the mufassal and that the same power was continued to the High Court. It was also held that, as the person against whom a writ was applied for acted under the written order of the Governor-General and Council, the Court would not direct the writ to issue. The latter part of this decision illustrates the limitation of the jurisdiction of the High Court over the Governor-General and Council. Referring to sections 1 and 2 of 21 Geo. III, c. 70 which emphasise the limitation of the powers of the Supreme Court, Norman, J., states thus:

> "Therefore as the superintendent of the jail at Alipore holds the prisoner under the warrant in writing of the Governor-General in Council, it is clear that such order must prevail as against the command of any writ which this Court has power to issue It appears to me, therefore, that I ought not to issue a writ which it would be the duty of the superintendent of the jail to disobey."

From this it follows that the jurisdiction of the Supreme Court at Madras over the Governor and Council (*see* 39 and 40 Geo. III, c. 79 already referred to) was limited in the same way as was the jurisdiction of the Supreme Court over the Governor-General and Council of Bengal by 21 Geo. III, c. 70. In other words, the Supreme Court at Madras, when it was established in 1800, had no jurisdiction over the Governor and Council for acts counselled, ordered or done by them in their public capacity as enacted in 21 Geo. III, c. 70 with reference to the Calcutta Supreme Court. Having regard to the fact that Governor-General and Council enjoyed the exemption referred to, *jointly and severally,* it must be held that in Madras also the exemption from the jurisdiction of the Supreme Court affected the Governor and Council jointly and severally. The Letters Patent of the Supreme Court were issued, on the 26th of December, 1801, in pursuance of the Statute, 39 and 40 Geo. III, c. 79. Clause 8 of that Charter enacted that the Supreme Court shall

11 (1870) 6 Beng. L.R. 392.

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have

". . . . . such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit."

In exercising these various powers of the Court of King's Bench, the Supreme Court had no jurisdiction, as we have seen, over the Governor and Council of Fort St. George. It follows, therefore, that the Madras High Court, which has inherited the powers of the Supreme Court by Letters Patent, in exercising its "jurisdiction, powers and authority" under section 106 (1) of the Government of India Act, has no jurisdiction over the Governor and Council jointly or severally.

The above conclusion is controverted by the learned counsel for the petitioners by referring to section 130 of the Government of India Act, which repeals the Acts specified in the fourth schedule to the Act to the extent mentioned in the third column of that schedule. It is pointed out that 13 Geo. III, c. 63, 21 Geo. III, c. 70, 39 and 40 Geo. III, c 79 and 24 and 25 Vict., c. 104 are all repealed either in part or in whole, and that having regard to the following paragraph of section 130 the exemption claimed by the Governor and Council no longer exists and that the only exemption which they can claim is under section 110 of the Government of India Act which, it is argued, according to its terms cannot be availed of by them.

" . . Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any Letters Patent or other document, to any enactment repealed by this Act, shall for all purposes be construed as references to this Act or to the corresponding provision thereof" (*See* section 130)

This argument cannot be accepted, as the powers of the Supreme Court limited in its operation are, as shown above, still retained by the High Court under section 106 (1), and the High Court in exercising these various powers under that section can only exercise them subject to the restriction which I have pointed out. In this connection it is also argued that having regard to the "powers and authorities" vested in the High Court without any restriction by section 9 and the language of section 11 of the High Courts Act, it must be held that the old restriction has not been carried out in the Act, but this argument is also untenable as the High Court has inherited the powers of the abolished Courts, the jurisdiction of which was restricted in the manner already pointed out.

The argument as regards section 110 will be dealt with later on.

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Having thus established that under section 106 (1) of the Government of India Act the High Court has no jurisdiction over the Governor and Council jointly or severally for acts done or counselled by them in their public capacity, the respondent argues that the same exemption can be claimed by the "Governor acting with Ministers" in relation to a transferred subject. It is objected that unless by statute "Governor acting with Ministers" within the meaning of the Government of India Act is assimilated to the "Governor and Council" referred to in the enactments, the exemption from the jurisdiction of the High Court granted to the Governor and Council cannot be extended in favour of the "Governor acting with Ministers". The petitioners are prepared to concede for this argument that the "Governor in Council" under the Act may claim the exemption in question. This leads to the anomaly that one limb of the Government that supplanted the Governor and Council of old is not subject to writs of *certiorari,* while the other is. The learned Government Pleader argues (1) that the acts done, counselled, etc., in the administration of the transferred subjects are acts done by the Governor; if this argument is not acceptable, he states (2) that under section 31 of the General Clauses Act the Governor and Council may be identified with the "Governor in Council" and the "Governor acting with the Ministers" under the Government of India Act.

Section 31 of the General Clauses Act is as follows:—

"In any enactment made by any authority in British India before the date on which section 3 of the Government of India Act, 1919, comes into operation, and in any rule, order, notification, scheme, by-law or other document made under or with reference to, any such enactment, any reference by whatever form of words to an authority authorised by law, at the time the enactment was made, to administer executive Government in any part of British India, shall, where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed for all purposes, after the abovementioned date, as a reference to such new authority"

I have already overruled the argument that the orders of the Local Government in relation to transferred subjects are "Orders of the Governor". Section 31 of the General Clauses Act is of no use in solving the difficulty, as it obviously applies only to laws made by "any authority in British India" and not to Acts of Parliament. It seems to me, however, that if the Governor can claim the exemption in question from the jurisdiction of the High Court under section 106 (1), as I have held he can, then clearly it is not illogical to infer from this circumstance that no writ of *certiorari* can be issued by the High Court also against the Governor acting with Ministers,

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How can in actual practice exemption be given to the Governor, which he is entitled to claim as a matter of statutory right, if it is held that proceedings can be directed against the Governor acting with the Ministers? The inconsistency is obvious. I must therefore hold that if the High Court has no jurisdiction to issue the writ of *certiorari* against the Governor under section 106 (1) of the Government of India Act, it has equally no jurisdiction to issue the writ against "the Governor acting with the Ministers".

The next branch of the argument relates to the exemption claimed under section 110 of the Government of India Act which is as follows:—

"The Governor-General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the Executive Council of the Governor-General or of a Governor or Lieutenant-Governor, and a Minister appointed under this Act, shall not—

(*a*) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only;"

The exemption from the original jurisdiction of the High Court granted by this section to the persons named therein relates only to "anything counselled, ordered or done by any of them in his public capacity". There can be no question that the order complained against in these proceedings was passed by the authority concerned in its public capacity. If with respect to such an order both the Governor and the Ministers are severally exempt from the jurisdiction of the High Court, provided that the jurisdiction invoked against them is its original jurisdiction, then it follows as a matter of inference that the Governor acting with the Ministers must also be exempt from the Court's jurisdiction. The question then for consideration is whether "the writ of *certiorari*" is issued by the High Court in the exercise of its original jurisdiction. Having regard to the authorities, this question must be answered in the affirmative—

"*Certiorari* is an original writ issuing out of the Chancery or Court of King's Bench directed in the King's name to the Judges or officers of inferior Courts commanding them to return the records of a cause or matter depending before them, to the end the party may have the more sure and speedy justice before the King or such Justices as he shall assign to determine the cause" (*See* Note 1 at page 14 of *The Practice of the Crown Office*, by Short and Mellor, 2nd Ed.)

The High Courts Act, section 9, in investing the High Court with the powers of the King's Bench invested it with the power to issue writs of *certiorari*. Under the Judicature Act, 36 and 37 Vict., c. 66, section 34 (2), the original jurisdiction to issue writs exercised by the Court of King's Bench was assigned

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to the Queen's Bench Division of the High Court. The following note under section 34 of the Judicature Act of 1873 in the Yearly Practice of the Supreme Court (1924) clearly shows that writs in England were issued by the Court of Queen's Bench in the exercise of its original jurisdiction—

"Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of this Act included the supervision of the decisions of inferior tribunals generally by *certiorari*" (*R* v. *Chantrell*[12] and *The Overseers of the Poor of Walsall* v *London and North Western Railway Company*[13])

The original jurisdiction of the Queen's Bench to issue a writ of *certiorari* was assigned to the King's Bench Division by section 56 (2) of the Supreme Court of Judicature Act, 1925, and the same note which I have quoted above appears under this section in the "Yearly Practice" for 1928. To the same effect is the following note which appears in the Annual Practice, 1929, under section 56 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925:

"The exclusive jurisdiction extended to the supervision of inferior Courts by prohibition, *certiorari*, case stated at common law, etc." (*See* page 2171.)

These authorities show that in England a writ of *certiorari* is issued by the King's Bench in the exercise of its original jurisdiction and, as I have already stated, it is this jurisdiction which was vested in the High Court by the High Courts Act. It may be pointed out that in England under section 45 of the Judicature Act an appeal lies to the Divisional Court against an order in matters of *certiorari*. In this connection the observations of Wallis, C.J., in *Chief Commissioner of Income-tax* v. *North Anantapur Gold Mines, Ltd.*[14], regarding the jurisdiction under which the writ of mandamus (a prerogative writ like the writ of *certiorari*) is issued by the High Court, may usefully be referred to. The learned Judge observes:

"Now, the issuing of the writ of mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise was, it seems to me, clearly an exercise of original jurisdiction. It was a proceeding originating in the Court issuing it, and might be directed in a proper case to any class of public officer, executive or judicial It must also be regarded as having been within the original jurisdiction of the Supreme Court because that Court had no appellate jurisdiction."

Having regard to these authorities it must be held that in India this Court's power to issue the writs of *certiorari* falls within its original jurisdiction as distinguished from its appellate or other jurisdictions and it is in this sense that the expression "original jurisdiction" is used in section 110 of the Government of India Act.

12. (1875) L.R. 10 Q.B. 587 13 (1878) 4 A.C. 30.
14 (1921) I.L.R. 44 M. 718 at 725: 41 M.L.J. 177.

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Sir C. P. Ramaswami Aiyar attempted to show with reference to the nature of the writ that the High Court in issuing it exercises its appellate or revisional or supervisory jurisdiction. No doubt the writ of *certiorari* is described as—

"The process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdiction, requires the Judges or officers of such jurisdiction to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below" (*See* Short and Mellor, Crown Practice, 2nd Ed, p 14)

This describes the nature of the writ, but no inference can be made from it as regards the special jurisdiction of the High Court under which it is issued. The petitioners' learned counsel relied on the following observation of Norman, J., in In the matter of *Ameer Khan*[11] in support of his argument:

"I may observe, moreover, that the issuing of the High prerogative writ of *habeas corpus ad subjiciendum* is not a matter of ordinary original civil jurisdiction In England, it issues on the Crown Side of the Court of Queen's Bench, and in the late Supreme Court the motion for such *habeas corpus* was made in the Supreme Court, and not on any side, such as the Plea Side or Equity Side of the Court" (*See* Fulton's Reports, page 372, note.)

In understanding these observations reference must be had to the context in which they were made. The learned Judge was considering the question whether a writ of *habeas corpus* can be issued into the muffasal, that is, beyond the ordinary territorial jurisdiction of the original side of the High Court. The sentences which succeed the extract quoted above, to my mind, make the position clear—

"The limits within which such writs can be issued are, in my opinion, not affected by the 11th clause of the Charter of 1865. The answer to the question as to the local limits within which such *habeas corpus* may be issued appears to me to depend on the jurisdiction which the late Supreme Court possessed under the Charter of 1774;"

In the passage quoted, the expression "original jurisdiction" is used in contrast with the jurisdiction over the muffasal which the High Court has, and not in contrast with the appellate and other jurisdictions of the High Court. The passage in *Besant* v. *Advocate-General of Madras*[10], namely—

"Their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of *certiorari*, can be said to have been taken away,"

also in my opinion does not support the petitioners. The expression "ordinary jurisdiction" in this pass-

10 (1919) L.R. 46 I.A. 176 I.L.R. 43 M 146 at 159: 37 M L J. 139 (P C).
11. (1870) 6 Beng. L.R. 392 at 438

age is used as opposed to "extraordinary jurisdiction" and the other jurisdictions of the High Courts and not in the technical sense in which I think the expression "original jurisdiction" is used in section 110 of the Government of India Act. Attention may be drawn to the following observations of the Judicial Committee in In the matter of *Candas Narrondas*[15] to elucidate the meaning of the expression "ordinary jurisdiction" appearing in the above passage.

"Mr. Rigby argued that the passages of the Charter which have just been epitomized divide the jurisdiction into four classes, ordinary original, extraordinary original, appellate and those special matters which are the subject of special and separate provisions But their Lordships are of opinion that the expression 'ordinary jurisdiction' embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it, and that it is opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and by special orders."

If the expression "ordinary jurisdiction" is understood as explained by their Lordships in the Bombay case, then it is clear that the passage in *Besant* v. *Advocate-General of Madras*[10] does not really help the petitioners. It must therefore be held that the jurisdiction to issue a writ of *certiorari* falling under the original jurisdiction of the High Court, this Court has no jurisdiction to issue such a writ against the Governor acting with the Minister for Public Health.

It will thus be seen that the Governor acting with Ministers is entitled to claim exemption from the jurisdiction of the High Court for acts counselled or ordered by them in their public capacity both under section 106 (1) and section 110 (*a*) of the Government of India Act. It is needless to speculate as to why the Legislature has provided this double safeguard for the Local Government. We have seen how it originated and how it was passed on from statute to statute. It was argued that since provision for the exemption of the Government from the High Court's jurisdiction is found explicitly in section 110 of the Act, it must be assumed that no such provision can be extracted from section 106 (1). This assumption, even if correct, does not help the petitioners; but I have show that section 106 (1) also exempts the Government from the High Court's jurisdiction. The learned Government Pleader, basing his arguments on the extensive powers given to the High Court under the first paragraph of section 9 of 24 and 25 Vict., c. 104, as distinguished from the powers of the "abolished Courts" given

10. (1919) L.R. 46 I.A. 176 I L R. 43 M. 146. 37 M.L J 139 (P.C.).
15 (1889) L R. 16 I A. 156. I L.R. 13 B. 520 at 533 (P.C.).

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to it under the second paragraph, has attempted to offer some explanation for including in the same Act two sections dealing with the same subject; but I do not think it is necessary to embark on this inquiry, however interesting it is; we are familiar with legislation "by way of abundant caution"; probably, section 110 was enacted to make sure that the wholesale repeals and amendments effected by the Government of India Act did not interfere with this safeguard which is a relic of antiquity.

We now come to the last question—

3. Should the writ be granted in the present case?

As I have held that this Court has no jurisdiction to issue a writ of *certiorari* against the Local Government, this question does not arise for consideration.

In the result, this Civil Miscellaneous Petition is dismissed with costs.

C. M. P. No. 4277 *of* 1929.—This case is governed by the judgment we have just delivered. The petition is dismissed with costs of the Government. The petitioner will pay to respondents 1 and 2 Rs. 150 for their costs in this petition.

B.V.V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE CURGENVEN.

Rajah Kocherlakota Venkata Jagannadha Rao Garu .. *Appellant** (*Defendant*)

v.

Maharajah Ravu Venkata Kumara Mahipati Surya Rao Bahadur Zamindar Garu and others .. *Respondents* (*Plaintiffs*).

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Transfer of Property Act (*IV of* 1882), *Ss* 54 *and* 118, *Amended Act* (*XXVII of* 1926), *S* 2—*"Attested"—Mortgage deed executed by a Pardanashin lady—Signature by the executant in the absence of witnesses—Witnesses signing the instrument in the absence of executant—Validity of—Forbearance to take proceedings—Whether can form part of consideration of sale—Personal covenant by a guardian on behalf of a minor son—Whether enforceable.*

Under a compromise between the plaintiff and the defendant, a village with its hamlets was agreed to be retained by the defendant from the plaintiff in consideration of a sum of rupees and of his forbearance to take certain legal proceedings Being unable to pay in cash the amount which formed part of the consideration, the adoptive mother who was as well the guardian of the defendant, executed in favour of the plaintiff a bond for that amount on the security of the same village along with a personal covenant to pay, contained in the mortgage itself. The lady signed the deed when neither the writer nor the attestors were present and further she did not

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*Appeals Nos. 409 at 452 of 1925. 1st May, 1930.

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acknowledge to the attestors that she signed the document. The attestors also did not sign the instrument in the presence of the executant. The plaintiff subsequently sued for the money under the mortgage and in the alternative claimed that he was entitled to a vendor's lien over the said properties for the unpaid purchase money and that there was a statutory charge in his favour.

Held, (1) that the mortgage deed was not valid as it was not properly "attested" according to the definition in S. 2 of the Transfer of Property Amended Act (XXVII of 1926),

(2) that in so far as the amount sued, was only part of the consideration, the other portion being the forbearance on the part of the defendant, to take certain proceedings unfavourable to the plaintiff, the transaction cannot be described as a sale under section 54 or an exchange under section 118 of the Transfer of Property Act.

Madam Pillai v. *Badrakali Ammal,* (1922) I.L.R. 45 M. 612 at 617: 42 M.L.J. 410 (F.B.) and *Samaratmal Uttamchand* v. *Govind,* (1901) I.L.R. 25 B 696 (F.B.), referred to

(3) that the property of the minor son may be proceeded against by the plaintiff in satisfaction of the debt owing under the personal covenant by the guardian on behalf of her minor son.

Ramajogayya v *Jagannadhan,* (1918) I L R. 42 M. 185: 36 M.L.J. 29 (F.B.), relied on.

Kunhu Moidu v. *Madhava Menon,* (1909) I.L.R. 32 M. 410: 19 M.L.J. 584 (F.B.) and *Biswanath Prasad* v. *Chandra Narayan Chowdhury,* (1921) L.R 48 I.A. 127: I.L.R. 48 C 509: 40 M.L.J. 489 (P C), referred to.

Per *Chief Justice.*—A right to sue or to take proceedings cannot be the subject of ownership.

Appeals against the decree of the Court of the Government Agent, East Godavari, at Cocanada, dated 6th July, 1925, in O.S. No. 4 of 1924.

T. Rangachariar for appellant.

The Advocate-General, S. Srinivasa Aiyangar, S. Venkatesa Aiyangar and *C. Rama Rao* for respondents.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.—Appeal No.* 409 *of* 1925.—The plaintiff's suit was for a mortgage decree for Rs. 1,88,487-15-6 representing principal and interest alleged to be due under a mortgage deed, Ex. A. This deed arose out of the compromise already dealt with in Appeal No. 446 of 1925. It will be remembered that under that compromise, dated the 29th of November, 1920, one of the properties purchased in the Court sale, viz., Polavaram village with its hamlets was agreed to be retained by the Rajah of Polavaram in consideration of the payment of the sum of Rs. 1,39,986-1-0 to the plaintiff. The compromise was entered into by the Rajah's adoptive mother. This amount had

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been deposited in Court by the plaintiff being the balance remaining after the Court sale of the defendant's properties by the plaintiff. Being unable to pay this sum in cash the 1st defendant's adoptive mother as his guardian executed in favour of the plaintiff on the 14th of December, 1920, a bond for that amount repayable with interest at 9 per cent. per annum on the security of the Polavaram village and its hamlets. This bond is Ex. A. Alternatively, the plaintiff claims that he is entitled to a vendor's lien over these properties for the unpaid purchase money and that there is a statutory charge in his favour.

The Judge in the Court below allowed the suit finding that the suit bond, Ex. A, was a valid one. The 1st defendant, however, contended that Ex. A was not validly attested, because the attestors did not see the executant sign, nor did the executant acknowledge to them in their presence that she had signed it and that she was not present at the attestation. If (1) the attestors did not see the executant sign Ex. A, (2) the executant did not acknowledge to them that she had signed it, and (3) the attestors did not sign the instrument in the presence of the executant, then the instrument has not been properly attested within the meaning of section 2 of the Transfer of Property (Amendment) Act (XXVII of 1926). Ex. A on the face of it bears the signature of the adoptive mother and guardian of the 1st defendant. The witnesses are B. Venkata Rao and Chengalva Kondayya. Then execution is admitted by Prakka Subramaniam, the agent of the 1st defendant's adoptive mother and guardian. This is witnessed by Kandukuri Subbayya and the before mentioned B. Venkata Rao. There is nothing on the face of the document to show that even the acknowledgment of the execution of the document by Venkata Buchayamma, the adoptive mother and guardian of the 1st defendant, was made in the presence of these witnesses; but there is a still greater defect because the signature of Venkata Buchayamma upon the evidence clearly was not affixed in the presence of the two attesting witnesses. It must be remembered that this lady was a gosha lady. The evidence of the attesting witnesses is as follows:—P.W. 1, Appayya, the clerk of the 1st defendant and the writer of Ex. A, says that Buchayamma observed gosha, that the attesting witnesses were at her house when the deed was sent inside for her signature and that after its return with her signature they attested. The next witness, Chengalva Kondayya, says that he saw Buchayamma sign it, that Venkata Rao, the other attesting witness, also saw and that after they had seen her sign they attested it. He further states:

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"I do not remember seeing her sign any other document. The documents are sent in by Dasis. We should stand outside the wall so that we should not see her The Dasi brings back the papers after signature I do not know the name of the Dasi who took in Ex A She brought it back signed . . . . . . I attested in the verandah near the window of the Rani's room. . . I saw Rani sign through the window It is about breast high from the ground She was sitting. I stood . . Rani sat on the floor when she signed. The window was jhilmil. Two planks were broken I saw through the broken plank . . . We both saw through that hole I suppose Venkata saw."

The other attesting witness was not called. The evidence of Chengalva Kondayya seems to me to be palpably false. It is obvious that at the trial the necessity for strict compliance with the Transfer of Property (Amendment) Act (XXVII of 1926) had become apparent and so Kondayya's duty in the witness box was to show that both he and the other attesting witness had actually seen the Rani sign the document, and thus we have the evidence that both the attesting witnesses looked through the window two planks of which were conveniently broken to enable them to see the Rani who was sitting also most conveniently in a direct line with the broken window planks. This evidence is so improbable and is obviously for the purpose of getting within the provisions of the Transfer of Property (Amendment) Act that it must be rejected. Ex. A, therefore, must be held to be invalid for want of proper attestation.

Then the learned Advocate-General argues that the plaintiff has a vendor's lien on the property for the unpaid purchase price In order to substantiate this claim Ex. A must be a sale by the plaintiff to the defendant. Two objections are taken to this claim: (1) that the Polavaram village never passed to the plaintiff at the Court sale and he, therefore, had no ownership in the property to pass by conveyance to the 1st defendant, and (2) that, even if he had, Ex. A does not amount to a sale of that property at all. A sale is defined by section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised or part paid and part promised," and it is contended by Mr. Rangachari on behalf of the 1st defendant that "price" means money only and that if the consideration for the transfer of immoveable property is partly money and partly something else, then the transaction ceases to be a sale. In this connection he relies upon *Madam Pillai* v. *Badrakali Ammal*[1], a Full Bench decision. In that case a husband orally transferred lands to his wife to be enjoyed by her during her life-time in discharge of future main-

1. (1922) I.L.R. 45 M. 612: 42 M.L.J. 410 (F.B.).

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tenance and it was held that this not being a gift or a sale might be made without writing. Dealing with section 54 of the Transfer of Property Act, Sir Walter Schwabe, C.J., on page 617 states:

"In this case one has to consider whether there was a price paid or promised by the transferee. Now 'price' has a well defined meaning It means money, but not necessarily money handed over in current coin at the time but includes money which might be already due, or might be payable in future"

With this opinion Coutts Trotter, J. (as he then was) agreed. Another case referred to was *The Queen-Empress* v. *Appavu*[2]. That was a case under the Abkari Act and it was held that the payment of wages in liquor does not amount to a sale of liquor within the meaning of section 2 of the Abkari Act. Hutchins, J., in dealing with this question states at page 142:

"The question still remains whether a payment of wages by liquor is included in the general term 'selling' It seems to us that it is not Both in the Contract Act and the Transfer of Property Act a sale is defined to be an exchange of property *for a price* Section 118 of the latter Act deals with exchanges for other considerations than a money payment, and thereby indicates that a price included money only, and that is the ordinary meaning of the word 'price'"

In *Samaratmal Uttamchand* v. *Govind*[3] the question for determination was whether agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under Art. 5, Schedule I of the Indian Stamp Act (II of 1899) and are liable to stamp duty of eight annas each as agreements "not otherwise provided for" and it was held that they were so liable. Chandavarkar, J., in delivering the judgment of the Full Bench quotes from Benjamin on Sale, 4th Edition, pages 2 and 89 as follows:

"The difference between a *sale* and an *exchange* is this, that in the former the price is paid in money, whilst in the latter it is paid in *goods* by way of barter."

He then proceeds:

"This distinction has been observed by the Legislature in this country, as will appear on a reference to section 118 relating to exchange and the sections relating to sale in the Transfer of Property Act."

Section 118 of the Transfer of Property Act is as follows:

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only the transaction is called an 'exchange'."

From Ex. B, the compromise petition, it is obvious that the payment by the Rajah of Polavaram of Rs. 1,39,986-1-0 was only part of the consideration for the transfer to him of

2. (1885) I L R 9 M 141. 3. (1901) I L R 25 B 696 (F.B.).

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the property in question, because it is there stated that it is out of regard for 6th defendant's family and in consideration of his not taking any proceedings to set aside the sale, that the transfer is made. It is conceded that the value of the property is more than three lakhs of rupees and therefore the price agreed to be paid for it is less than half of its real value. This circumstance alone would not be sufficient to deprive the transaction of its nature of a sale because a vendor is perfectly entitled to sell his property if he so desires to another for less than its real value and it still remains a sale. But the facts are quite different here because it is clear that one consideration for the transfer was something in addition to half of the value of the property. There was to be a forbearance on the side of the Polavaram family to take proceedings to set aside the sale and if "price" means money only as clearly it does, then this transaction cannot be described as a sale. It was not, in my opinion, even an exchange, because section 118 of the Transfer of Property Act deals with mutual transfer of the ownership of one thing for the ownership of another. No doubt the ownership of the Rs. 1,39,000 and odd was agreed to be exchanged for the ownership of the property. That, by itself, would be a sale; but it is coupled with the other consideration, namely, the forbearance to take proceedings. In my view, there can be no such ownership as that. A right to sue or to take proceedings cannot, in my view, be the subject of ownership. In the view I have taken upon this point it is not necessary to consider whether or not the plaintiff ever got such an ownership in the property as would enable him to transfer it to any one. The sale to him of this property was never confirmed by the Court and it is extremely doubtful whether under such circumstances he could claim to dispose of the property as its owner, although he might transfer such incomplete right to the property as he then had and I do not propose under the circumstances to say anything more than to observe that it is a point about which I have considerable doubt.

Then the learned Advocate-General claims that he is at least entitled to a decree against the general assets of the Rajah of Polavaram ranking of course with the other claimants for a rateable distribution. His claim, therefore, is to fall back upon the personal covenant to pay contained in the mortgage on his failure to succeed on the footing of the mortgage. In this connection he relies upon *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madhava Menon*[4], where it was

4. (1909) I.L.R. 32 M 410: 19 M.L.J. 584 (F.B.).

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held by a Full Bench that a document which purports to be a mortgage but is not a mortgage owing to non-compliance with the provisions of section 59 of the Transfer of Property Act regarding attestation is not a document which is required by law to be attested within the meaning of section 68 of the Evidence Act and is admissible to prove the personal covenant to pay therein which is not required by law to be attested. This case, of course, does not deal with the position of a personal covenant by a minor or on a minor's behalf and the plaintiff has to go a step further. So another case relied upon by the Advocate-General and more directly in point is *Ramajogayya* v. *Jagannadhan*[5], a Full Bench case. There it was held by Ayling and Seshagiri Aiyar, JJ., that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree can be passed against the minor on his attaining his majority or his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject, and that a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister. Sir John Wallis, C.J., however, held that a decree cannot be passed against a minor on his attaining his majority or his estate on a covenant entered into on his behalf by a guardian for his benefit In the view of the latter the only cases where a minor's estate can be made liable are those under section 68 of the Indian Contract Act, namely, a liability to persons who have supplied him during his minority with necessaries suited to his condition in life. The only exceptions according to Sir John Wallis are those cases where a creditor may have his rights of subrogation but not a right to direct recourse. Seshagiri Aiyar, J., with whose opinion Ayling, J., agreed, was of opinion that a guardian can, on behalf of a minor, incur a liability which is under the Hindu Law binding upon him. This is not limited to a liability for necessaries only. But the true test is not whether the transaction is for the benefit of the minor. The question whether or not this obligation was one which was binding on the minor seems to me to be answered by the attitude adopted by him in the suit. It is quite true that in his written statement he pleads that he was a minor when the mortgage was executed and that it is not binding upon him and an issue was taken upon this plea, and it is quite clear that at the

5. (1918) I.L.R. 42 M. 185: 36 M.L.J. 29 (F.B.).

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trial the 1st defendant did not adduce any argument or evidence in support of that plea. He was there attacking the mortgage but it is quite clear to me that if he was unable to attack the mortgage upon that ground, he is unable to attack the covenant on that ground. The defence open to him upon the mortgage was equally open to him as regards the covenant and he did not attempt at the trial to substantiate his plea. If he had done so, he would have been met with the answer that he could not, whilst retaining the property set up the plea that his guardian had no authority to enter into an obligation under which he came into possession of the property. He would have been met, therefore, with the answer that if his guardian had no authority to acquire the property on his behalf, he would be bound to restore the property to the plaintiff. As before mentioned, he did not put forward any such plea; and he must be taken to have waived the question as to whether or not the covenant entered into on his behalf by his guardian was binding upon him. The answer must be that it was and, being so, he is liable to have a decree passed against his personal assets. I do not think that it makes any difference upon this point whether the plaintiff actually got complete ownership of the property in question irrespective of the confirmation by the Court of sale or not. He obviously got something and if it were necessary to complete the transaction and get the confirmation of the sale by the Court, obviously that confirmation could be got at any time by a request being made for it. Put at its highest against the plaintiff, he had a conditional ownership of the property in question and that he was entitled to transfer to the 1st defendant for a consideration. That he did. In return for that transfer, the guardian of the minor entered into a personal obligation on his part to pay for it and it is clear to me that the property of the minor may be proceeded against by the plaintiff in satisfaction of the debt owing under that personal covenant. A point was taken by Mr. Rangachari that the plaintiff did not claim in his plaint a personal decree against the 1st defendant. That is quite true. He did not do so in terms. He was in that suit claiming on the mortgage and it seems to me unreasonable to hold that claiming on what he considered to be a valid mortgage, he ought nevertheless to have based his claim in the alternative on the covenant and asked on it for a personal decree against the 1st defendant. In this connection mention may be made of a decision of the Privy Council, viz., *Biswanath Prasad* v. *Chandra*

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Narayan Chowdhury[6]. In that case a suit was instituted to enforce a mortgage bond. In the Trial Court the learned District Judge made a decree in favour of the plaintiff. This decree was reversed upon appeal by the High Court of Calcutta on the ground that the mortgage was invalid for want of registration. On appeal to the Privy Council this judgment was affirmed. On page 517 their Lordships made the following observations:—

"As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made; and further, whether under all the circumstances the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs."

In that case no argument was presented to the High Court in support of the alternative claim. Here we have had that claim fully argued. It is obvious from the decision above referred to that the High Court can entertain such an application even if has not been in terms put forward in the plaint. There is discretion in the Court to amend the pleadings if such an amendment should appear to be necessary. In my view, no such amendment is necessary, because I am of opinion that the greater claim, namely, that on the footing of the mortgage, includes the lesser claim, namely, that on the corresponding covenant, and I am satisfied that we have had before us all the materials necessary to decide this point. If it were a question of an amendment of the pleadings, I should most certainly have acceded to any request for such an amendment, but I do not think any question of the amendment of the pleadings now arises. Nothing prejudicial to the case of the 1st defendant is caused by this action, because, as I have already stated, no defences other than those which were open to the 1st defendant in the mortgage suit are open to him on a claim under the covenant. He had full opportunity for putting forward his defences to the mortgage, namely, that it was not binding on him. For good reasons he did not choose to do so and, as before stated, that plea has been waived. I cannot imagine

6 (1921) L.R. 48 I.A. 127: I.L.R. 48 C. 509: 40 M.L.J. 489 (P.C.).

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that any other plea can possibly be open to him here. Under these circumstances, therefore, the appeal must be dismissed and there must be a decree for the amount claimed payable out of the property in the hands of the 1st defendant. The 1st defendant is directed to pay the plaintiff's costs of this appeal and in the Court below.

Curgenven, J.

Curgenven, J.—The evidence that the mortgage bond was duly attested is almost beneath criticism. According to the amended definition of "attested" inserted in the Transfer of Property Act (XXVII of 1926) it has to be shown in the circumstances of the present case (*a*) that each of the two witnesses saw the executant sign, or received from her a personal acknowledgment of her signature, and (*b*) that each witness signed the instrument in the presence of the executant.

The evidence shows that the document was taken to the Rani, who was gosha, by a Dasi. She signed it inside a room. Neither the writer nor the attestors entered the room. The writer (P.W. 1) says that neither the attestors nor himself saw her sign. Only one attestor is examined. He says that he did see the executant sign, because two slats of the venetian shutter to the window were broken and he was able to look through. His co-attestor did the same thing. Evidently it was purely by chance that they did this, and not by arrangement and in order to fulfil some legal requirement. It can hardly be doubted that the evidence has been got up to afford formal proof that the bond was duly executed. The second condition, too, that the executant should be present when the witnesses sign does not seem to have been complied with. The only conclusion is that the suit, as a mortgage suit, must fail.

It is urged that, nevertheless, the plaintiff is entitled to a charge upon the property mortgaged or, what is the same thing, upon the property conveyed to the 1st defendant under the compromise of 29th November. It is agreed that the plaintiff may have a charge (1) in the form of a vendor's lien for the unpaid purchase money, if the conveyance was a sale; or, if not, (2) if it appears to have been the intention of the parties to create a charge for that money.

It appears to me impossible to sustain the latter alternative. Paragraph 7 of the compromise petition seems to show that when it was entered into, the intention was that a cash consideration should be paid for the Polavaram village and its appurtenances, and no question of a charge, if the money remained unpaid, seems to have arisen. It was found impossible

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to raise the money, so on the 14th December the plaintiff took the mortgage bond from 1st defendant's guardian. Since that bond, had it been validly executed, would in itself have created a security superior to a charge, it is not to be supposed that any separate charge could have been in contemplation. Thus at no stage does any such intention appear to have existed. I think that in each of the cases cited to us where a charge has been deemed to have existed circumstances from which such an intention may be inferred have been found. They are cases in which allowance has been payable by the holder of an estate to some person, such as a relative, with a claim to be maintained out of estate funds. An example is the Privy Council case *Narayana Ananga* v. *Madhava Deo*[7] followed by Seshagiri Aiyar, J. (from whom Wallis, Offg.C.J., differed on the question of charge) in *Rajah of Ramnad* v. *Sundara Pandiaswami Thevar*[8]. The latter case went up to the Privy Council as *Rajah of Ramnad* v. *Sundara Pandiaswami Thevar*[9] and their Lordships agreed with the former learned Judge that upon a proper construction of the transaction a charge was established. Cases of this type bear no resemblance to the present one, where nothing has been proved to suggest an implied intention to create a charge.

The plaintiff must then fall back to the position that the conveyance embodied in paragraph 7 of the compromise was a "sale" as defined in section 54 of the Transfer of Property Act; that is to say, a transfer of property for a price. The expression "price" refers to money and money alone, as has been held by a Full Bench of this Court in *Madam Pillai* v. *Badrakali Ammal*[1]; if any part of the consideration consists in something other than money it may be an exchange, as defined in section 118 of the Act, or it may be a transfer not within the terms of the Act, but it cannot be a sale.

Now it is clear that, under the terms of paragraph 7 of the compromise, the 1st defendant undertook to do something else besides paying money; the consequence was to be "in consideration of his not taking any proceedings to set aside the sale" of the whole property, *i.e.*, the Polavaram Zamindari. If this formed part of the consideration for the transfer, then the consideration was something not wholly money, and the transaction was not a sale. The learned Advocate-General argues

1 (1922) I.L.R. 45 M 612 42 M.L.J. 410 (F.B.).

7. (1892) L.R. 20 I A. 9· I.L.R. 16 M. 268 (P.C.).

8 (1914) 27 M.L.J. 694.

9. (1918) L.R. 46 I.A. 64: I.L.R. 42 M 581: 31 M.L.J. 164 (P.C.).

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that it was a sale with a collateral contract, and would compare it to a sale with an option to repurchase. The comparison, I think, is not very close, because in the latter case the accompanying contract relates only to the subject-matter of the sale, whereas here the vendee's undertaking applies to the whole of the property included in the Court sale.

I think it is clear that the plaintiff must very substantially have reduced the price of the property in view of obtaining this undertaking, indeed it is said that for 1·40 lakh was conveyed property worth 3·25 lakhs. If so, the money value to the plaintiff of the undertaking was not less than the sum in cash which he asked for. It seems impossible to hold accordingly that the undertaking itself was not part of the valuable consideration for the transfer, and if that be so it was not a sale, and the vendor has no statutory lien upon the property. This disposes of the claim to a charge.

There remains a further contention, that a decree may be given against the 1st defendant's assets. Although the mortgage bond may as such be invalid, it includes an agreement signed by the guardian of the then minor to pay the purchase money to the vendor, and this will be enforceable, it is said, in the same way, as in the case of an adult, such an agreement may be enforced personally against him. The first objection raised to the grant of this remedy is that it was not asked for in the plaint. But the plaintiff, I think, can scarcely be expected to have contemplated the rejection of his mortgage bond as invalid, and so to have made an alternative request of this nature. The suit was upon a mortgage, and the plaint concluded with the prayer that if the proceeds of the sale were insufficient to meet the debt, the plaintiff should be at liberty to apply for a decree for the balance against the other properties of the 1st defendant. It appears to me that, if in other respects, the claim is admissible, it should not be rejected merely because the liability of the assets for the debt was not asserted in the circumstances which have actually arisen. In so far at least as the property which the 1st defendant's guardian purported to mortgage is concerned, it is surely a case of the less being included in the greater. Can then a claim of this kind be enforced? The undertaking to pay being embodied in a registered bond, admittedly the plaintiff's suit was within the six years allowed. The further question is whether the guardian's promise to pay binds the minor's estate. It has been decided by a Full Bench in *Pulaka Veetil Muthalakulangara Kunhu*

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Moidu v. *Thiruthipalli Madhava Menon*[4] that a mortgage deed not duly attested may be used as evidence of a personal covenant to pay. How the matter stands when the person on whose behalf the covenant has been made is a minor has been considered by another Full Bench in *Ramajogayya* v. *Jagannadhan*[5]. That too was a case of a mortgage, which was found to be invalid for want of Government sanction. The debt was contracted by the mother as guardian to discharge minor debts incurred for maintenance and for the marriage expenses of a sister of the minor. It had to be decided how far the Privy Council decision in *Waghela Rajsanji* v. *Shekh Masludin*,[10] which was (to quote the head note) that "a guardian cannot contract in the name of a ward, so as to impose on him a personal liability" must be construed as an absolute bar to the enforcement of such contracts. Sir John Wallis, C.J., while recognising that the ruling does not affect the liability of a minor's estate under section 68 of the Contract Act—which indeed does not require the intervention of a guardian—thought that "a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit". Of the other two learned Judges, Ayling, J., agreed with Seshagiri Aiyar, J., and the latter put his opinion into these words:

"No decree should be passed against the minor or his estate on a contract entered into on his behalf by his guardian, under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject."

The learned Judge goes on to say that the answer given by the learned Chief Justice "read with his opinion" would cover the above opinion also, an observation which does not make it very easy to understand what precisely he means. One thing seems clear, that the mere test of a benefit secured for the minor by means of the debt will not suffice. If that were all that was meant, the view of the two learned Judges who formed the majority would have been not in virtual agreement with but in direct opposition to the view of the learned Chief Justice. The opinion seems rather to have been that while benefit is not the test, any liability to which the minor would be subject under the Hindu Law is not the less a liability because it was incurred by his guardian on his behalf. This is an intelligible and indeed

4 (1909) I L R. 32 M 410 19 M.L.J. 584 (F.B.).
5 (1918) I.L.R 42 M. 185. 36 M.L J. 29 (F.B)
10. (1887) L.R. 14 I A. 89 I.L.R. 11 B. 551 (P C.)

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almost an indisputable proposition, and it probably sufficed to dispose of the particular case out of which it arose.

It seems to me that, if the circumstances of the present case are considered, a solution of the question is almost self-evident. In his written statement the 1st defendant pleads that he was a minor when the mortgage bond was executed, and that it is not binding upon him. The second issue inquired whether the bond was not binding upon him but the judgment shows that at the trial this issue was not disputed. If he waived this plea in the case of the mortgage, *a fortiori* he waived the plea that the debt, as an unsecured debt, was not binding upon him. The explanation of this attitude is clear enough. The 1st defendant cannot at once approbate the bargain by retaining the property, which he obviously desires to do, and reprobate it by the plea that his guardian had no authority to acquire it on his behalf. I do not think that we can now allow him to say that the promise made by his guardian on his behalf to pay the cash consideration is not binding upon him. In other words, his property may be proceeded against by the plaintiff in satisfaction of the debt. I agree, therefore, that the main appeal (A.S. No. 409) must be allowed in part, by substituting a decree of this kind for the mortgage decree, and in other respects dismissed, with the order as to costs proposed by my Lord.

Appeal No. 452 *of* 1925.—In view of our judgment in Appeal No. 409 of 1925 no orders are necessary on this appeal. No order as to costs.

K.C. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Unnamalai Ammal .. *Appellant* (Plaintiff)*

v.

Gopalaswami Chetti and others .. *Respondents (Defendants* 1 *to* 3).

Unnamalai Ammal v. Gopalaswami Chetti.

Transfer of Property Act (IV of (1882), *S* 81—*Person acquiring for valuable consideration interest in the property not mortgaged to the second mortgagee—Paying off the first mortgage—Suit by him for contribution against the second mortgagee—Right of marshalling—Whether can defeat right for contribution of the person acquiring interest in the property*

The 1st defendant mortgaged his properties mentioned in Schedules A and B to the 1st mortgagee and again mortgaged A schedule properties only and some other properties not in the suit to the father of defendant 3. Plaintiff, who was a decree-holder of the mortgagor, brought, in execution of

*S.A. No. 494 of 1927. 28th April, 1930

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his decree, to sale the properties mentioned in B schedule and purchased them The 2nd defendant, another decree-holder of the mortgagor, brought the A schedule properties to sale and purchased them. The first mortgagee of the suit properties brought a suit to recover his amount from the mortgagor and impleaded the subsequent mortgagee, the plaintiff, and the 2nd defendant, as parties along with the mortgagor (defendant 1). Plaintiff paid off the amount of the decree obtained by the first mortgagee The 3rd defendant himself had already brought a suit for his mortgage money and in execution of his decree brought the properties to sale and purchased them. Plaintiff brought the present suit for contribution against A schedule properties in the hands of defendant 3 On the question whether the second mortgagee would be entitled to the right of marshalling under section 81 of the Transfer of Property Act and thereby could deny the plaintiff his claim for contribution,

Held, that the plaintiff was entitled to contribution against the A schedule properties in the hands of the 3rd defendant

As the section refers to the right of the second mortgagee to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, it is clear that the time with reference to which the section is speaking is the time when the prior mortgagee seeks to realise his mortgage amount If at the time there is already a person, who has acquired for valuable consideration an interest in the properties not mortgaged to the second mortgagee, then the right of marshalling does not exist

Flint v. *Howard,* (1893) 2 Ch 54 at 73, relied on

The right of the plaintiff not to be marshalled did not depend on whether he had notice of the second mortgage

Ghose on Mortgages, Vol II, p 812, referred to.

Second appeal against the decree of the District Court of West Tanjore in A.S. No. 68 of 1925 preferred against the decree of the Court of the District Munsif of Mannargudi in O.S. No. 511 of 1923.

R. Kuppuswami Aiyar for appellant.

A. V. Visvanatha Sastri and *N. S. Rangaswami Aiyangar* for respondents.

The judgment of the Court was delivered by

Ramesam, J

Ramesam, J.—The facts of the second appeal may be stated as follows:—The 1st defendant was the original owner of the suit properties which are described in Schedules A and B of the plaint Both these sets of properties were mortgaged to Kuppuswami Pillai on the 20th June, 1910, under Ex. I. Afterwards the 1st defendant effected a second mortgage of the properties in Schedule A only and some other properties not in the suit in favour of 3rd defendant's father in 1914 by Ex. E. The plaintiff obtained a mortgage decree in Small Cause No. 8 of 1926 against the 1st defendant and in execution of the decree purchased the properties in Schedule B by a sale certificate, Ex. IV, dated 6th August, 1917. Afterwards, the 2nd defendant in execution of a decree in Small Cause

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No. 1238 of 1914 purchased in Court auction the properties in Schedule A. In 1917 a suit was filed by the 1st mortgagee to enforce his mortgage impleading the 1st defendant, the plaintiff, the 2nd defendant and the 3rd defendant and obtained a decree on the 8th February, 1919: Ex. C. He applied for execution of the decree in July, 1923. The plaintiff paid off the decree amount. The plaintiff now brings the suit for contribution against "A" schedule properties in the hands of the 3rd defendant. It may be mentioned that the 3rd defendant himself in 1922 filed a suit on his mortgage and obtained a decree and purchased the properties in execution of his own decree (Ex. II). This was on the 8th February, 1924. Both the Lower Courts holding that the 3rd defendant has got the right of marshalling under section 81 of the Transfer of Property Act denied the right of contribution and dismissed the plaintiff's suit. The District Munsif in his judgment referred to *Rajkeshwar Prasad Narain Singh* v. *Mohammad Khalil-ul-Rahman.*[1] It is also relied on by the advocates for the respondent before us. That decision and the decision in In the matter of *Joshy Assam*[2] merely decide that the right of marshalling which a second mortgagee has got is not lost by the fact that he afterwards purchases in execution of his own decree. But the point with which we are concerned now is not whether the respondent is not entitled to the right of marshalling by reason of the fact he has purchased in execution of his own decree but whether he has got the right of marshalling against a person in the position of the plaintiff. Section 81 of the Transfer of Property Act says that the right of marshalling exists against a mortgagor but not "so as to prejudice the rights of the 1st mortgagee or any other person who has acquired for consideration an interest in either property". As the section refers to the right of the 2nd mortgagee to have the debt of the 1st mortgagee satisfied out of the property not mortgaged to the 2nd mortgagee, it is clear that the time with reference to which the section is speaking is the time when the prior mortgagee seeks to realize his mortgage amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the 2nd mortgagee, then the right of marshalling does not exist. The section is therefore clearly in favour of the appellant. Primarily, the right of marshalling is a right given against a mortgagor. Any further extension of the equity must be made very clear

1. (1924) I.L.R. 3 Pat. 522 2. (1895) I.L.R. 23 C 290.

by the language of the statute Halsbury's Laws of England, Vol. XXI, section 544 relied on by the respondent is against him. It does not exempt right of marshalling in express terms against purchasers. It allows it against mere judgment-creditors. This obviously refers to judgment-creditors who had not become purchasers. The case cited in the footnote "c" in *Gray* v. *Stone*[3] refers to a case of judgment-debtors who had not yet purchased before the question arose. The dictum of Lord Justice Kay in *Flint* v. *Howard*[4], viz., "It is not enforced against a mortgagee or purchaser of the other estate" supports the appellant. The right of the appellant not to be marshalled does not depend upon whether he had notice of the 2nd mortgage. *See* Ghose on Mortgages, Vol. II, page 812. We think, therefore, that the Courts below have erred in dismissing plaintiff's suit. The plaintiff is entitled to contribution. No finding has been given as to the amount to which the plaintiff is entitled. The Court will have to find the amount which can be rateably charged upon the properties in "A" Schedule with reference to the value of the properties at the time of the 1st mortgage. The Court will submit its finding upon the 5th issue with reference to the above remarks with such incidental consideration of the 3rd issue as may be necessary. Time 1 month after the re-opening of the High Court. Time for objections 7 days.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE SUNDARAM CHETTY.

Alagammal .. *Appellant** (*Plaintiff*)

v.

Sadasiva Padayachi and others .. *Respondents* (*Defts.*)

Civil Procedure Code (V of 1908), *O* 43, *R* 1 (*u*), *O* 41, *R.* 23, *O* 34, *R* 1—*Appeal—Remand—Preliminary issue—Mortgage decree—Suit for delivery of possession—Issue raising liability of plaintiff to be redeemed—Parties to mortgage suit—Criminal Procedure Code* (*V of* 1898), *Ss* 88 *and* 89—*Attachment of property of person absconding—Interest of the Government in the property—Right to redeem mortgage thereon—Transfer of Property Act* (*IV of* 1882), *S* 91.

An issue in a suit to recover possession of properties purchased in execution of a mortgage decree, raising the question if the plaintiff was

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*C.M.A. Nos 500 and 501 of 1928 6th August, 1930

3. (1893) W.N 133

4 (1893) 2 Ch 54 at 73.

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entitled to an unconditional decree or if he was liable to be redeemed by another person having an interest in the property and not impleaded in the mortgage suit, is in the nature of a preliminary issue within the meaning of O. 41, R. 23. The decision on such an issue is appealable under O. 43, R. 1 (u).

Where the Government has attached the property of a proclaimed person under S. 88 of the Criminal Procedure Code and such person has not appeared within the time specified in the proclamation, the position of the Government in relation to those properties is not simply that of an attaching decree-holder but is at the least analogous to that of a receiver in possession and management. The Government has such an interest in the property as to entitle its being made a party to a suit on a mortgage over that property and a decree obtained in a suit to which the Government was not impleaded cannot prejudice its right of redemption.

Quaere.—What is the exact nature of the rights derived by the Government under S. 88 (7) of the Criminal Procedure Code? Do the properties vest in the Government as owners? Or does the Government become the absolute owner of the income from those properties after the period fixed in that clause?

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, dated 1st August, 1928, and passed in A.S. No. 77 of 1928 (A.S. No. 116 of 1927, District Court, Trichinopoly) preferred against the decree of the Court of the District Munsif of Ariyalur in O.S. No. 1057 of 1925.

K. Bhashyam Aiyangar and *V. C. Viraraghavachariar* for appellant.

The Government Pleader and *M. Patanjali Sastri* for respondents.

The Court delivered the following

JUDGMENT.—These miscellaneous appeals arise out of two orders of remand passed by the learned Subordinate Judge of Trichinopoly in two connected appeals on his file. When these appeals came on for hearing the learned advocate for the respondents took the preliminary objection that the appeals did not lie. In order to appreciate the nature of the suits and of the preliminary objection raised before us it is necessary to state a few facts. One Arumugam was owner of the suit properties. On the 5th March, 1912, he hypothecated these properties in favour of the plaintiff's husband. The plaintiff filed O.S. No. 686 of 1922 on the file of the District Munsif's Court of Ariyalur after her husband's death to recover the money due on the mortgage of the 5th March, 1912. To that suit she made Arumugam, the mortgagor, as defendant. After obtaining the usual mortgage decree, she had the properties sold in execution of the decree and herself became the purchaser, and the sale certificate Ex. A was issued in her name on the 15th March, 1924. On 10th May, 1924, she sought to obtain deli-

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very of the properties in execution of the sale certificate. Then she was obstructed by the defendants who claimed to have purchased these properties from the Government under circumstances which would be described later on. Being obstructed in thus obtaining possession she filed these two suits, one against the defendants who were in possession of some of the properties included in the sale certificate but which were claimed by them as having been purchased from the Government, the defendants in the other suit being in possession of the other property covered by the sale certificate which they had purchased from the Government. The defendants pleaded that the Government ought to have been made party-defendant in O.S. No. 685 of 1922, and that as they derived their title through the Government they would be entitled to redeem the plaintiff's mortgage. The learned District Munsif raised issue No. 3 as follows: "Is the plaintiff's mortgage redeemable as contended?" The learned District Munsif who tried the suits was of opinion that the possession of the Government was only that of an attaching creditor and consequently the Government was not entitled to be made party to the suit brought on the mortgage, and in any event could not claim any right to redeem plaintiff's mortgage at present. He accordingly decreed the plaintiff's suit for possession unconditionally. The defendants preferred appeals to the Lower Appellate Court, and the learned Subordinate Judge of Trichinopoly came to the conclusion that the defendants were entitled to redeem the plaintiff's mortgage as they had not been made parties to the prior suit. O.S. No. 685 of 1922; he modified the decree of the Trial Court and declared that the defendants were entitled to redeem the plaintiff, and to find out the exact amount payable on redemption, he remanded the suits to the Trial Court for disposal according to law. It is against the order of remand passed in each of these two connected appeals that the plaintiff has preferred these two miscellaneous appeals.

The learned advocate for the respondents took the preliminary objection that in these circumstances these miscellaneous appeals do not lie. The appeals have been preferred under O. 43, R. 1, clause (*u*) on the footing that the orders of remand were passed by the Lower Appellate Court under O. 41, R. 23, Civil Procedure Code. The learned advocate argued that it should not be taken that the Trial Court decided any preliminary issue nor could the Appellate Court be said to have reversed the finding of the Trial Court on such a preliminary issue. He accordingly contended that the present must be

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taken to be a case where the Lower Appellate Court remanded these suits under its inherent jurisdiction, and he argued that, having regard to the decisions which hold that no appeal would lie against orders of remand passed under the inherent jurisdiction of Courts, these appeals are not maintainable. We are unable to agree with that contention. As we read the pleadings and also the proceedings in the Trial Court, we understand that the 3rd issue was intended to raise the question whether the plaintiff was entitled to an unconditional decree for possession, and also whether the defendants would be entitled to redeem, in which case the plaintiff would be entitled to possession only if the defendants failed to redeem. We take that to be the real meaning and significance of the third issue framed in the suit. In this view, the Lower Appellate Court was entitled to come to its own finding upon that preliminary issue, and as the Lower Appellate Court held that the defendants would be entitled to redeem, we think that on its reversing the finding of the Trial Court on this preliminary issue it was entitled to remand the suit for disposal on the other points under O. 41, R. 23, Civil Procedure Code. We are supported in this view by the decision of the Full Bench in *Raman Nayar* v. *Krishnan Nambudripad*[1]. We accordingly overrule the preliminary objection.

Coming to the merits, the learned advocate for the appellant argued that the present is the case of an attaching decree-holder not having been made a party to the prior suit upon the mortgage. He drew our attention to the recent decision of a Full Bench of this Court in *Subramaniam Chettiar* v. *Sinnammal*,[2] where the Full Bench held that the mere circumstance that an attaching decree-holder was not made a party to a suit upon a mortgage is not a ground for compelling the purchaser of the properties in execution of the mortgage decree to be redeemed by the attaching decree-holder. We may state that the learned Government Pleader who appeared for the respondents did not, having regard to the decision of the Full Bench, contest that proposition of law. The ground of decision by the District Munsif was that the position of the defendant was that of an attaching decree-holder merely. In paragraph 13 this is what the learned District Munsif said:

"All these circumstances go to show that the interest of the Government was only that of an attaching creditor and that the property did not vest in the Government."

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1 (1922) I.L.R. 45 M 900: 43 M.L.J 354 (F B.)
2. (1930) I L R, 53 M 881 · 59 M.L J 634 (F.B).

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We must now take it that if the interest of the Government was only that of an attaching creditor, it would follow from the recent decision of the Full Bench that the District Munsif's view should be upheld.

But it was argued on behalf of the respondents by the learned Government Pleader that the position of the Government in such a case as this is not simply that of an attaching creditor. Before examining this aspect of the case it is necessary to mention a few further facts to make the further discussion intelligible. It would appear that the mortgagor Arumugam was alleged to have committed the offences of robbery and dacoity and that he evaded service of summons. The properties of the absconder Arumugam—the immoveable properties now in dispute—were accordingly attached under the provisions of the Criminal Procedure Code. Ex. I, dated the 19th August, 1919, is the order of attachment. Subsequently a receiver was appointed on the 22nd September, 1919, and in 1923 the defendants became the purchasers of the properties from the Government. On these facts it was argued on behalf of the Government that, having regard to the provisions of sections 88 and 89 of the Criminal Procedure Code, it should be taken that when the proclaimed person did not appear within the time specified in the proclamation, the property under attachment had come at the disposal of the Government; and accordingly the Government took possession of the properties and subsequently sold them to the respective defendants in these suits. It was argued in the first instance that the properties must be taken to have become vested in the Government as owners. The learned Government Pleader also argued that the Government became the absolute owner of the income from these properties after the period fixed in section 88, clause (7). Finally he argued that in any event the position of the Government should be taken to be that—or analogous to that—of a receiver in possession of the properties and entitled to rents and profits thereof and that in such cases the Government have got sufficient interest in the properties as entitled them to redeem the prior mortgage. Our attention was drawn to the decisions in *Golam Abed* v *Toolseeram Bera*[3] and *The Secretary of State for India* v *Rangaswami Aiyangar*[4] in support of these propositions. The learned advocate for the appellant on the other hand argued that all that the Government would be entitled to

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3 (1883) I L.R 9 C 861

4 (1916) 31 M L.J. 120.

under section 88 (7) would be to keep the properties as agent of the absconder and that after the expiry of the two years their rights—whatever they were—came to an end and the properties continued to be the properties of the absconder. For the purpose of disposing of these appeals, we do not think it necessary for us to come to a definite opinion on the first two questions raised by the Government Pleader on behalf of the respondents in this case. We are clearly of opinion that the possession of the Government is not merely that of an attaching decree-holder, which was the view taken by the learned District Munsif. We are also clear that the possession of the Government is not that of an agent of the absconder. An agent holds property for and on behalf of the principal and not on a title inconsistent with the title of the principal. That surely is not the position of the Government in this case. The Government in the circumstances did not hold the property on behalf of the absconder but as against him. Being of opinion that the analogy of an agent of the owner does not apply to the case on hand, we proceed to see whether there is any distinction between the effect of an attachment by a Civil Court and the effect of an attachment under Chapter VI of the Criminal Procedure Code. We are of opinion that there are some essential differences between an attachment by a Civil Court in execution of a money decree and an attachment contemplated by Chapter VI of the Criminal Procedure Code. We have to give effect to the words "the property under attachment shall be at the disposal of Government" occurring in clause (7) of section 88, in cases where the proclaimed person does not appear within the time specified in the proclamation. The subsequent clause in our view affirms the view that the Government is not simply an *agent* of the owner. The clause proceeds to say, "but it shall not be sold until the expiration of six months from the date of the attachment". That, we take it, means that, when once the property under attachment is declared to be at the disposal of Government, it would be open to the Government to sell that property. We are of opinion that it would also be open to the Government to dispose of the property in any other manner; surely it would be open to the Government to be itself in possession of the property, or to lease the property and receive the income of the property during this period. That being so, the position is, in our view, at the least analogous to the case where a receiver is appointed for the possession and management, etc., of immoveable properties. In such a case it seems to us that any suit instituted to enforce any lien or charge by

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the sale of such properties for which a receiver has been appointed and of which he is in possession would be defective without the receiver being made a party to it. Our attention was drawn by the learned Government Pleader to the case reported in *Jotindra Nath Chowdhury* v. *Sarfaraj Mia.*[5] There the Court (Mookerjee and Teunon, JJ.) observes at page 657, that a receiver appointed in the course of a mortgage suit is not a necessary party to a suit by a creditor of the mortgagor for the enforcement of a purely personal claim against him, but in an action to enforce a lien against a specific property in which a receiver is interested, he should be made a party. In that case it was further pointed out that, although a receiver is in one sense the custodian of the property involved in the litigation in which he is appointed, he had such special property therein as to make him the representative of the rights of the parties in all actions or proceedings affecting the property, and in that character he was entitled to notice in all cases in which parties would have been entitled to be brought before the Court had there been no receiver. Again, it was held in *Paya Matathil Appu* v. *Kovamel Amina*[6] that a *verumpattom* tenant in Malabar claiming under a lease from the *ottidar* is entitled to redeem the prior kanom. At page 153 of the report the learned Judges conclude their discussion of the question as follows:

> "So long as the plaintiff has an interest validly entitling him to possession, he is in a position to redeem"

As already mentioned, it is not necessary for the disposal of this appeal to define the exact nature and scope of the rights derived by the Government under section 88, clause 7. We are clear that the interest possessed by the Government is not that of a mere attaching decree-holder. As we have already stated, it cannot be said that the expression "property at the disposal of Government" could with any propriety apply to the case of a mere attaching decree-holder. Being of opinion that the effect of section 88 is to create an interest in the property and to entitle the Government to be in possession of the property, we hold that the Government was a necessary party to the prior suit under O. 34, R. 1 of the Code. Not having been made a party, the Government's right of redemption could not be affected. In this case we have the further fact that the suit O.S. No. 685 of 1922 was filed more than two years after the date of the attachment. Under section 89 the position of the Gov-

5. (1910) 14 C.W.N. 653
6 (1895) I.L.R. 19 M. 151: 5 M.L.J. 279

ernment after the expiry of the two years would surely be not weaker than it was before. How far it becomes stronger is not necessary for us to exactly define in this case.

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We, therefore, hold that the interest which the Government had in the immoveable properties now the subject of the suits before us was such as gave them a right to redeem the properties, and the relief given to the defendants by the Lower Appellate Court, to which no objection has been taken by the respondents by way of cross-appeal, is not open to any legal objection by the plaintiff.

We, therefore, dismiss these miscellaneous appeals with costs (one set in each appeal).

S.R. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

A.L.A.R. Arunachalam Chettiar through the authorised Agent Guruswami Aiyar .. *Appellant** (*11th Respondent*)

v.

Ry. Pratapasimha Rajah Sahib .. *Respondent* (*Petitioner*).

Arunachalam Chettiar v. Pratapasimha Rajah Sahib.

Civil Procedure Code (V of 1908), S 144 and O. 20, R. 18—Powers of Court—Charge for equalising shares—Restitution—Scope of—Interlocutory order embodied in final decree—Appeal

In working out a preliminary decree, the Court may, for the purpose of adjusting the shares, give one of the parties a charge over the share of another for any difference in favour of the former.

Poovanalingam Servai v. *Veerayi*, (1925) 22 L.W. 782, and *Rajah of Vizianagram* v. *Raja Setrucherla Somasekhararas*, (1903) I.L.R. 26 M. 686 (F.B.), referred to

This can be done even in an interpleader suit after the passing of a preliminary decree.

S. 144 of the Civil Procedure Code is not confined exclusively to matters in execution The power of restitution is inherent in the Court and can be exercised between the preliminary and final decrees in a suit.

Where an interlocutory order passed preparatory to a final decree has been embodied in a final decree, it can be attacked only by an appeal against the final decree.

Appeal against the order of the District Court of West Tanjore at Tanjore, dated 25th November, 1925, in I.A. No. 346 of 1925 in O.S. No. 3 of 1919 and Petition under section 115 of Act V of 1908. and section 107 of the Government of

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*C.M.A. No. 46 of 1926 and C.R.P. No. 48 of 1926. 18th February, 1930.

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India Act praying the High Court to revise the order of the District Court of West Tanjore at Tanjore, dated 25th November, 1925, in O.S. No 3 of 1919 (O S. No. 26 of 1912 on the file of the Sub-Court, Tanjore).

Sir C. P. Ramaswami Aiyar for *T. M. Krishnaswami Aiyar* and *N. Swaminatha Aiyar* for appellant.

T. V. Muthukrishna Aiyar, S. V. Narayana Aiyar and *A. V. Viswanatha Sastri* for respondents.

The Court delivered the following

Wallace, J.

JUDGMENTS. *Wallace, J.*—This appeal and the civil revision petition relate to the same matter, an order passed by the District Court of West Tanjore. The civil revision petition is put in by way of caution in case this Court holds that the Civil Miscellaneous Appeal does not lie. The respondents have in fact taken a preliminary objection that the Civil Miscellaneous Appeal does not lie, but the discussion on that point is more easily set out if we deal first of all with the case on the merits.

The facts necessary for disposal are: The parties to these proceedings are some of the parties to what is known as the Tanjore Palace Estate suit, an interpleader suit filed by the Receiver of the Estate to determine who were the rightful owners. The chief contesting respondents before us are the defendants known as the Mangalavilas defendants, originally defendants 4 to 11. A preliminary decree in that suit was passed on the 1st of July, 1918. It awarded 3|4th share to these defendants. Appeals were preferred to the High Court. While these were pending a stay petition was put in by one of the other defendants, and in his order thereon passed on the 7th of November, 1919, Krishnan, J., at the request of the Mangalavilas defendants, allowed these latter to withdraw monies deposited to the credit of the Estate in the Lower Court up to the limit of the shares due to them under the preliminary decree, but subject to security being given for the return of these monies if the High Court decree diminished their shares. Various sums of money were then drawn out under these conditions. The High Court's preliminary decree was passed on the 21st January, 1924, and it reduced the share of the Mangalavilas defendants to 3|7th. The Mangalavilas defendants had drawn monies in excess of this share under Krishnan, J.'s order and, therefore, had to refund. Now, on the 29th of January, 1923, before the preliminary decree of the High Court was passed, defendants 8, 9, 11, 25 and 26, the two latter being the legal representatives of the 7th defendant, who are some of the

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Mangalavilas defendants, sold a half of their right, title and interest in the property to the present appellant. At the time of the sale that half share represented 5|32 of the property. By the High Court decree that was reduced to 5|56. After the High Court decree, the suit was sent back to the District Court for final decree. In that Court, on the 27th of March, 1925, the appellant was on his application made a party to the suit as the 31st defendant. On the 16th of September, 1925, the District Court passed what it called an interim final decree, apparently on some agreement between the parties allotting his proportionate share to each. On the 21st of September, 1925, the 2nd defendant, one of the successful appellants in the High Court, applied in I.A. No. 346 of 1925 for restitution of the amounts overdrawn by the Mangalavilas defendants under the order of Krishnan, J. Instead of ordering restitution or payment back into Court, the District Court on the 25th of November, 1925, directed that the shares allotted to the Mangalavilas defendants be made subject to a charge for the overdrawn amounts, and directed further that the half share bought by the 31st defendant be also subject to this charge. This charge has been embodied in the final decree of the District Court, dated the 27th of February, 1926. It is against the order of the 25th of November, 1925, this civil miscellaneous appeal and the civil revision petition are preferred by the 31st defendant on the ground that the order errs both in law and on the merits.

The main arguments are: (1) that if the order imposing a charge at that stage of the trial of the suit, namely, between the preliminary decree and the final decree, is to be regarded as an order in the suit itself, it is beyond the powers of the Court, whose duty after the preliminary decree has been passed is only to work out the preliminary decree and not to go beyond it, that its duty is limited to delivering the shares to which the preliminary decree has declared the parties entitled, that this interim final decree and the order under appeal are proceedings unknown to law, that the Court cannot by way of an interlocutory order in the suit engraft on the preliminary decree a decision on the matter of a charge which, as being a matter concerning the rights of the parties *inter se* can only be lawfully decided before the passing of the preliminary decree, (2) that, if this order is to be regarded as a separate order under section 144, as indeed it purported to be, it is *ultra vires*, since section 144 applies only to matters in execution, (3) that, however the order be regarded, it has imposed a charge for

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the recovery of what was a mere personal obligation on the part of the Mangalavilas defendants and that the Court has no right so to convert a personal obligation into a charge by a mere interlocutory order, (4) that the Lower Court was wrong in imposing a charge until the remedy offered by the security had been exhausted, it being admitted that no attempt to enforce that has yet been made, and (5) that in any case the charge will take effect only from the date of the order, the 25th of November, 1925, and, therefore, cannot affect the property transferred on 29th January, 1923, to the 31st defendant.

As to the power of the Court to impose such a charge by order or by final decree in the suit itself, it is not disputed that in an ordinary partition suit the Court may, in working out its preliminary decree for the purpose of adjusting shares, instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former. See *Poovanalingam Servai* v. *Veerayi*[1] and the *ratio decidendi* of *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz*[2]. In such a case it is obvious that the charge was not created by the preliminary decree but springs out of the obligation of the Court to allot each coparcener his proper share. That, it appears to us, is what the District Court has really done in this case. It is true that this was not a partition suit but was an interpleader suit. But when the preliminary decree was passed the suit became to all intents and purposes a partition suit, and, so far as the appellant is concerned, it could be nothing else, since his vendors did not include all the Mangalavilas people. Therefore, even if the Mangalavilas defendants had been entirely successful, there still had to be a partition between them.

Clearly, in the working out of a preliminary decree which declares certain parties entitled to certain shares, the Court is entitled to employ all reasonable methods in adjusting those shares, especially measures which will entail the least amount of trouble to all concerned, and if the imposition of a charge is, in the opinion of the Court, a suitable alternative to depriving a coparcener of some property in order to adjust the shares, the Court has discretion to impose a charge. That the order under appeal was in the course of the preparation of the final decree is clear. A petition for final decree had been put in by the 1st defendant on the 26th of March, 1925, long before the order

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1 (1925) 22 L.W. 782

2. (1903) I.L.R. 26 M. 686: 13 M.L.J. 83 (F.B.).

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now appealed against and it was in the course of the proceedings to determine the final decree that the order appealed against was passed. Viewing the order broadly, we think this is what the Lower Court intended to do and has done. In working out for the final decree the manner in which the property should be adjusted according to the theoretical allotments under the preliminary decree, by what is called an interim final decree, the Court decided that the imposition of such a charge was a reasonable method by which the excess amounts overdrawn should be recovered. That seems to us a proper discretion. Amounts had been drawn by virtue of the preliminary decree and under an order passed while the suit was pending. The situation created by that order had to be adjusted by the final decree in the suit. When the 31st defendant took his sale, the suit had clearly assumed the character of a partition suit, and the Court had jurisdiction to impose a charge on the share of the Mangalavilas defendants for the amounts overdrawn in order to compensate the other defendants for the amounts subtracted thereby from their rightful shares. The imposition of such a charge being within the scope of the suit and within the jurisdiction of the Court, any such charge imposed on the shares of the Mangalavilas defendants will bind their alienees who purchased *pendente lite*.

This is sufficient to decide the matter and we need not deal at length with the other points. As to the contention that the charge will have effect only from its date, that is answered by what has been already said, namely, that the imposition of a charge is within the scope of the suit and the 31st defendant's sale was *pendente lite*. As to the technical argument that the order is erroneous, because it purports to have been passed under section 144 and that that section will not apply because no decree has been varied or reversed, we are not satisfied that the principle of section 144 is confined exclusively to matters in execution. The Privy Council has in *Jai Berham* v. *Kedarnath Marwari*[3] laid down that the power of restitution is inherent in the Court and should be exercised when necessary in order to do justice. This Court has so exercised that principle in a suit at a stage between the preliminary decree and the final decree in a case *Cunniah Mudali* v. *Rangaswami Mudali*[4]. In any case, if the money was taken out under Krishnan, J.'s order by way of "execution" of that order in the suit, if that phrase may be used, it must follow that it should also be

3 (1922) L.R. 49 I.A 351: I.L R 2 Pat 10: 44 M L J 735 (P C).
4 (1918) 35 M.L J. 361.

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restored by way of "execution" of an order in the suit, that is, by provision in the final decree. As to the argument that the Court should not have imposed a charge until the remedy by way of enforcing the security had been exhausted, there were risks in that procedure. It might for example be held, as in fact this Court has held in a correlated matter, A.A.O. No. 263 of 1926, that Krishnan, J.'s order enures only for the benefit of that single defendant who applied for the stay.

As to the preliminary objection that no appeal lies at all, we are inclined to hold that it is a good objection, although the appellant has cause to complain about the manner in which the Lower Court phrased its order. The order has been unnecessarily drawn up in a decretal form as well as in a judgment form. In the judgment form the District Judge has recorded it in the following terms:

"Relief (9) has been granted in the order just passed in O.S. No. 3 of 1919, the main suit."

In the decretal form this has been recorded as follows:

"That relief (9) be granted (*vide* order passed in O.S. No. 3 of 1919)."

A reference to the order passed in O.S. No. 3 of 1919 shows that the order was:

"When the restitution amounts payable to defendants 1 and 2 are determined, the final decree will provide for a charge on the shares of defendants 8 to 11, 25, 26, 28 and 29 in immoveables under the final decree (evidently interim final decree), dated 16th September, 1925, enforceable in execution in addition to their personal liability; and the charge will bind the 31st defendant"

It is clear from this that the order was not an order independent of the final decree but that the order was to be embodied in the final decree, and, therefore, not until the final decree was drawn up did it come into force. This was in accordance with what the Lower Court had power to do and was entitled in its discretion to do. The office in drawing up the decretal form of the order wrongly phrased it as if it were an order independent of the final decree. In the view we take, any attack on this order ought to be put forward only by way of an appeal against the final decree and the 31st defendant has not put in any such appeal. The ruling in *Jogodishury Debea* v. *Kailash Chundra Lahiry*[5] is no doubt an authority for the position that a party can attack an interlocutory order passed preparatory to a final decree, but where the order complained against has been embodied in the final decree, the method of attack is not by an independent appeal

5 (1897) I.L.R. 24 C. 725 (F.B.).

but by an appeal against the final decree. See also *Bharat Indu* v. *Yakub Hasan*[6].

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Wallace, J.

For reasons given this appeal and the civil revision petition must fail. We dismiss them with costs in the appeal.

Jackson, J.—I agree.

S.R. *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Appayya Banga (dead) and others .. *Appellants** (*Defendants*)

v.

Koraga *alias* Santhappa Kajava .. *Respondent* (*Plaintiff*).

Appayya Bangu v. Koraga.

Boundaries—Obliteration by party in permissive possession—Confusion with other property—Suit by owner to recover his property—Equitable interference by Court—Fresh partition

The plaintiff's father and his two brothers, of whom the defendant was one, effected a partition of some items of property. Subsequently, the plaintiff's father delivered possession of his share in a certain item to the defendant In a suit instituted by the plaintiff to recover possession of the said item it was found that the defendant had obliterated its boundaries and mixed it up with his own share in the property, thus rendering it impossible for the plaintiff to identify the item belonging to him The plaintiff having sued the defendant for ejectment or in the alternative for partition,

Held, that the plaintiff was entitled under the circumstances to invoke the equitable interference of the Court on his behalf and a decree should be passed for fresh partition of the entire property as between the parties.

Semble—The principle that in a case of confusion of boundaries the Court will not interfere unless some equity is super-induced by the act of the parties has to be applied with reference to the special circumstances of each case.

Wake v *Conyers,* (1759) 1 White and Tudor's Leading Cases 167: 1 Eden 331, *Speer* v *Crawter,* (1817) 35 E.R. 997· 2 Mer 410, *Miller* v *Warmington,* (1820) 37 E.R. 452· 1 Jac. & W. 484 and *Kavasji* v. *Hormasji,* (1904) I.L.R. 29 Bom. 73, referred to

Appeal against the decree of the District Court of South Kanara in Appeal Suit No. 478 of 1924 preferred against the decree of the Court of the Subordinate Judge of South Kanara in Original Suit No 50 of 1921.

B. Sitarama Rao for appellants.

K. Y. Adiga for respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff to recover

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*S.A. No 305 of 1927 4th August, 1930.

6. (1913) I.L.R. 35 A. 159.

possession of the plaint item 1 with mesne profits or in the alternative for partition of plaint items 1 and 2 into two equal shares and for delivery of one such share to him with mesne profits. The plaintiff's case is that plaint items 1 to 3 belonged to his father and his two brothers, the defendant and one Tammayya Banga, that there was an oral division of these items between the three brothers, in which item 1 fell to the plaintiff's father's share, item 2 to the defendant and item 3 to Tammayya Banga. Tammayya Banga has been in separate enjoyment of his share of the property. As regards item 1, the plaintiff alleged that when his father became the *ejman* of the family the defendant was allowed to remain in possession of that item on behalf of his father, and as his father's right had been sold to him he now claims possession of that item or a half share of items 1 and 2 as the defendant has mixed up the two items. The defendant, on the other hand, contended that all the properties were gifted to his mother and as her surviving son he is now absolutely entitled to the properties by right of survivorship. He also disputed the validity of the assignment of the plaintiff.

The Lower Courts found that there was an oral partition between the plaintiff's father and the other two brothers as alleged by the plaintiff and that his father's share was validly assigned to him. It was also found that the plaintiff's father put the defendant in possession of item 1 also, that he remained in possession of both items 1 and 2 and while so "he mixed up his share with plaintiff's father's share". In consequence of these findings and as it was not possible to identify the item which belonged to his father the Lower Courts gave a decree for partition of both the items 1 and 2 into two equal shares and for delivery of one share to the plaintiff. I may state here that no plea of adverse possession to the plaintiff's father's share of the property was set up by the defendant. The defendant admitted that he was in possession of the two items but stated that he had been holding them under a maintenance allotment which he has not been able to prove. It is clear that the defendant has not been able to put forward any valid title to the plaint item 1 and it is also clear that possession of the plaint item 1 from the plaintiff's father is admitted by him. The question is, in such circumstances, whether the plaintiff is entitled to get partition of both the items on the ground that he is not able to identify item 1 as the defendant has mixed up his share with the plaintiff's share, which, in other words, means that the defendant has obliterated the boundaries of the

two items and made it impossible for the plaintiff to identify his share.

Mr. Sitarama Rao's argument for the appellant shortly stated is this:—that, in a suit for ejectment, so long as the plaintiff is unable to identify the property from which he desires to eject the defendant, he is not entitled to a decree for partition and that the Courts have no jurisdiction to grant the plaintiff's prayer in such a case "unless some equity is super-induced by the act of the parties". In support of this proposition reliance has been placed on the leading decision in *Wake* v. *Conyers*[1] and the subsequent cases *Speer* v. *Crawter*[2] and *Miller* v. *Warmington*[3]. These cases have been referred to in *Kavasji* v. *Hormasji*[4]. Reference has also been made to *O'Hara* v. *Strange*[5] and Story's Equity Jurisdiction, Vol. II, section 840 and Hunt on Boundaries 256, etc. On the strength of these authorities it is argued that confusion of boundaries *per se* is no ground for interference by the Court and that the plaintiff in this case is not entitled to claim any relief as he is not able to show that the defendant is his tenant, agent or bailee or is a person in a fiduciary position towards the plaintiff which makes it incumbent on him to co-operate with him in re-establishing his title. It is admitted that the plaintiff and the defendant are not joint tenants or tenants-in-common or co-parceners. The question is whether in such circumstances the plaintiff is entitled to the relief of partition granted to him by the Lower Courts.

In *Wake* v. *Conyers*[1] it was pointed out—

> 'That the Court has no power to fix the boundaries of legal estates unless some equity is super-induced by the act of parties as some particular circumstance of fraud or confusion where one party has ploughed too near the other, or the like; nor has this Court a power to issue such commissions, of course, as here prayed."

In *Speer* v. *Crawter*[2] the Master of the Rolls after referring to the case of *Wake* v. *Conyers*[1] stated thus:

> "In the same case of *Wake* v. *Conyers*,[1] Lord Northington says, that, in his apprehension, this Court has simply no jurisdiction to settle the boundaries even of land, unless some equity is super-induced by act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes, *per se*, no ground for the interposition of the Court.
>
> "The present bill, in point of statement, laid a sufficient ground for such interposition, for it alleged the confusion to have taken place by the fault, or the neglect, of the owners of *Imworth*, while lessees of *Weston*. But that is not only not made out, but it is disproved If the ancient boundaries of the two manors be really unknown, as the plaintiff alleges

1 (1759) 1 W and T.L.C. 167: 1 Eden 331.
2 (1817) 35 E.R. 997: 2 Mer 410.
3. (1820) 37 E.R. 452. 1 Jac & W. 484.
4. (1904) I.L.R. 29 B. 73. 5. (1847) 11 Ir. Eq. Cas. 262.

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they are, how are Commissioners to ascertain them? or what is to be done if they cannot be ascertained? When it is through the default of a tenant or copyholder, that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased But, because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbour's estate."

In *Miller* v. *Warmington*[3] the following observations appear:

"But if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission. This is the case of persons claiming by an adverse title; there is no connection between them, to serve as a foundation for the Court to proceed on in ordering a commission. This subject was very luminously considered by the late Master of the Rolls in *Speer* v. *Crawter*[2], and that case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere between independent properties, and confusion of boundaries *per se* is no ground to support such a bill."

The decision in *Kavasji* v. *Hormasji*[4] after referring to the above leading decisions declined relief to the plaintiff as the learned Judges found that the litigants were independent proprietors and it was impossible to regard them as individuals having such relations the one to the other as would entitle the Court to treat the whole of land in their possession as a common fund capable of adjustment in giving each party a specified proportion of the property.

Having regard to the principles enunciated in the above cases it is necessary in this case to examine in what circumstances item 1 came to the possession of the defendant and how it was being held by him during all these years in order to find out whether the plaintiff can rely on any equity in his favour.

I have already stated that the property belonged to the plaintiff's father and his two brothers of whom the defendant is one. After division of the property between the brothers, the plaintiff's father was in possession and enjoyment of item 1. It was then that he put the defendant in possession of that item. The fact that the defendant obtained possession of that item from the plaintiff's father is in my view a *very important circumstance in this case.* No doubt the defendant's

2. (1817) 35 E.R. 997: 2 Mer. 410.
3. (1820) 37 E.R. 452. I Jac. & W. 484.
4. (1904) I.L.R. 29 B. 73.

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was put in possession of the property as an allotment for maintenance but this has been found against by both the Lower Courts. The defendant has not put forward any adverse title to the property. So it comes to this that the plaintiff has clearly established his title to the property in question and has proved that his father put the defendant in possession of it and that the defendant has not any title to it at all. The plaintiff has also proved that the defendant has by obliterating the boundaries made it impossible for him to identify the item belonging to him.

In the above circumstances can it be said that there is no equity in favour of the plaintiff which would require the Court to order partition? In my opinion the parties in this case cannot be said to be independent proprietors in the sense in which that term has been used in some of the cases above referred to. On principle one can understand why in a simple case of two independent proprietors who own adjoining lands with respect to which confusion of boundaries has taken place, the Courts refuse to help the plaintiff if he is not able to prove by evidence the boundaries of his estate. Of course, if he is able to prove that the defendant is a joint tenant or a tenant-in-common or a coparcener or holds his land as his agent, trustee or occupies a fiduciary position towards the plaintiff with respect to the land, then it is agreed that when the boundaries have been obliterated the equitable jurisdiction of the Court may be invoked in favour of the plaintiff to grant him partition. But do these cases of well-recognised legal relationship exhaust the category of equities which would make it incumbent on the defendant to co-operate with the plaintiff in establishing his title? I think not. In my opinion the principle that in a case of confusion of boundaries the Courts will not interfere unless some equity is super-induced by the act of the parties has to be applied with reference to the special features of each case. If the list of relationship is strictly limited to the classes mentioned above which is the contention very strongly urged before me, then it seems to me manifest injustice may be done, in cases like the present. I do not think the principles enunciated in the cases referred to above preclude the Courts from interfering in cases where obviously refusal to interfere will cause injustice to the plaintiff on account of misconduct on the part of the defendant with respect to property which he holds from him and to which he has no title. In this case it is noteworthy that from the year 1887 to 1908 the property was being leased sometimes in the name of the plaintiff's father or in the defendant's

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name simply and at other times in their joint names. After the death of the father in 1919, though by that time partition had been effected between the brothers, the patta of item 1 had been transferred to the joint names of the plaintiff and the defendant and from the year 1908 to as recent a date as 1920 it was the defendant that paid the assessment on behalf of the pattadar of plaintiff's father. It is true that the plaintiff has not been able to prove a specific case that the defendant was his lessee which he alleged in this and some other prior litigations; but the facts that I have just mentioned are sufficient to show, in my opinion, that the defendant, who has admitted possession of the property from the plaintiff's father, may (if necessary) be said to be his agent so far as that item is concerned. In *Miller* v. *Warmington*,[3] already referred to, speaking of *Speer* v. *Crawter*[2] the Master of the Rolls stated (this passage is quoted above) that:

"That case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant or those under whom he claims, of which you have a right to complain and which renders it incumbent on him to co-operate in re-establishing them."

This is all what the plaintiff has to prove in order to succeed in cases of this description. I think the plaintiff in this case has a right to complain inasmuch as he has proved that the defendant by his misconduct brought about a confusion of the boundaries of the property after he obtained possession of it from his father, and that, therefore, he is entitled to invoke the equitable interference of the Court on his behalf.

I would, therefore, uphold the judgment of the Courts below and dismiss the second appeal with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

T. S. Venkatabalagurumurthi Chettiar .. *Appellant** (*Plff.*)

v.

T. A. Balakrishna Odayar and others .. *Respondents* (*Defts.*).

Venkatabalagurumurthi Chettiar v. Balakrishna Odayar.

Religious Endowment—Temple—Trustee—Borrowing power—Purchase of goods for credit for necessary purposes—Liability of temple funds.

Where the trustee of a temple purchased goods on credit for the proper and necessary purposes of the temple, such as for the performance

*L.P.A. No 25 of 1927. 25th July, 1930.

2 (1817) 35 E.R. 997· 2 Mer. 410.

3 (1820) 37 E.R. 452 1 Jac. & W 484.

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of the worship and the feeding of the worshippers, and it was further proved that the goods bought were legitimately applied to those purposes,

Held, that the person who supplied the goods was entitled to recover their value from out of the temple funds, notwithstanding the fact that at the time when credit was taken the trustee had some cash on hand

Semble—There is no distinction between the borrowing powers of the head of a mutt and the borrowing powers of the trustees of a temple.

Vibhudapriya Thirtha Swamiar v *Lakshmindra Thirtha Swamiar,* (1927) L.R. 54 I.A. 228: I.L.R. 50 M. 497. 53 M.L.J. 196 (P.C.), relied on

Swaminatha Aiyar v *Srinivasa Aiyar,* (1916) 32 M.L.J. 259 and *Sundaresan Chetty* v. *Visvanatha Pandarasannadhi Avergal,* (1922) 43 M. M.L.J. 147, referred to.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Odgers, dated 1st September, 1926, in S.A. No. 1716 of 1923, preferred against the decree of the Court of the Subordinate Judge of Kumbakonam in A.S. No. 62 of 1922, preferred against the decree of the Court of the District Munsif of Kumbakonam, in O.S. No. 4 of 1920.

T. R. Ramachandra Aiyar and *P. J. Kuppanna Rao* for appellant.

Ramaswami Aiyangar and *Srinivasavaradachariar* for respondents.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—This is an appeal which originated in a suit in the District Munsif's Court of Kumbaonam (O.S. No. 4 of 1920). In that suit the plaintiff who was carrying on a *maligai* business sued the Sri Sarangapaniswami temple and its two trustees personally to recover a sum of Rs. 900 and odd which represented the balance of money owing to him by the temple for the supply of groceries to the temple, those groceries having been supplied for the purpose of the puja. There was also a claim for interest. It is worthy of note that the dealings between the plaintiff and the defendants were from the 1st January, 1912 to the 14th March, 1919 and we are here 11 years afterwards, finally I hope, adjudicating upon the plaintiff's claim. In the District Munsif's Court the hearing of this quite a small claim took 16 days, it took one day when it was taken up on appeal by the Receiver in this case to the Subordinate Judge's Court—and there the decree of the District Munsif in favour of the plaintiff was set aside—and the appeal before Odgers, J., lasted two days—and there the decision of the learned Subordinate Judge was upheld—so that before the case reached us nineteen

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days of judicial time had been occupied in determining the rights of the parties in this very simple case and I feel bound to say that the action of the Receiver in taking the case up on appeal from the District Munsif has resulted in a gross waste of time and money.

It is admitted that the goods supplied by the plaintiff to the temple were ordered and utilised for the puja performed in the temple; and it is also admitted that the orders were placed by persons whose duty it was to place those orders, namely, the trustees of the temple; so that the goods were supplied for the proper and necessary purposes of the temple and were ordered by persons who were doing so in the discharge of their duties as trustees of the temple.

The District Munsif gave a decree in favour of the plaintiff but the Subordinate Judge reversed that decree because he held himself bound by a decision in *Lakshmindra Thirthaswamiar* v. *Vibhudapriya Thirthaswamiar*[1], which was a decision with regard to the borrowing of money by the Swami of a Mutt. That case went up to the Privy Council and had not been decided at the time when the Subordinate Judge gave his judgment nor had it been decided when the case came before Odgers, J., and no mention appears to have been made of the case before him.

What we have got to consider now is whether that decision of the Privy Council, *Vibhudapriya Thirthaswamiar* v. *Lakshmindra Thirthaswamiar*[2], concludes this matter. As I have already stated, the facts of that case were that the head of a mutt had borrowed money for the purpose of discharging the duties for which he was responsible as the head of the mutt and the money had been legitimately applied for that purpose and it was held that it could be recovered from the succeeding head of the mutt, so that the decision of the High Court in *Lakshmindra Thirthaswamiar* v. *Vibhudapriya Thirthaswamiar*[1] was reversed on appeal by their Lordships of the Privy Council. I desire to refer to only one passage in the judgment of their Lordships, *Vibhudapriya Thirthaswamiar* v. *Lakshmindra Thirthaswamiar*[2] where they state the essentials in such a case. It is as follows:

"What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased Swami for his own purposes or for purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and.

1 (1922) 44 M L.J. 187.
2. (1927) L.R. 54 I.A. 228: I.L.R. 50 M 497 at 507· 53 M L J 196 (P C.)

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secondly, whether the moneys so borrowed were legitimately applied for those purposes "

Applying that test to the facts in this case it is quite clear that the credit was obtained not for the private purposes of the trustees but for the purposes of the temple and the goods were bought in the discharge of the duties under which the trustees lay in the performance of the worship and the feeding of the worshippers and it is not contested that the goods so bought were legitimately applied for those purposes. The facts in this case when tested by the Privy Council decision clearly make this claim sustainable by the plaintiff. But Mr. Srinivasavaradachariar argues on behalf of the Receiver that this decision of the Privy Council in *Vibhudapriya Thirthaswamiar* v. *Lakshmindra Thirthaswamiar*[2] is inapplicable to this case because that is a decision with regard to a mutt, that temple stands on an entirely different footing and that the trustees of temples are more restricted in their rights than persons who have charge of mutts But he has been quite unable to satisfy us that there is any such real distinction. Obviously there is a great distinction between a mutt and temple but it does not follow that there is a distinction between the borrowing powers of the Swami of a mutt and the borrowing powers of the trustee of a temple and a good deal of confusion seems to have crept into the argument on behalf of the respondent with regard to what really trustees are. Mr. Srinivasavaradachari argued the case on the footing that trustees are as restricted as trustees in England One case which he relies on is *Swaminatha Aiyar* v. *Srinivasa Aiyar*[3], but Mr. T. R. Ramachandra Aiyar points out that that case has been explained and distinguished in *Sundaresan Chetty* v. *Visvanatha Pandarasannadhi*[4]. That is a case which clearly shows that the essential is that the borrowing should be for temple necessity and not necessarily for financial necessity. Personally I cannot see very much distinction between "temple necessity" and "financial necessity". They both seem to me to be equally important. The argument put forward on behalf of the respondent, namely, that at the time when credit was taken by the trustees of the temple they had cash on hand with which to pay for the goods does not seem to me to have very much force. The argument of course is that there was no financial necessity for the credit being opened or taken by the trustees since they had cash on hand and we

2 (1927) L.R 54 I.A. 228: I.L.R. 50 M 497· 53 M.L.J. 196 (P.C.).
3 (1916) 32 M.L J. 259. 4. (1922) 43 M.L.J. 147 at 150

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are asked to say that there has been a finding of fact upon this point which we cannot interfere with. It is quite true that the Subordinate Judge says in his judgment that there is evidence that during this time large sums of money came into the hands of the trustees, that there was money put out with Chetties; and from this he draws the inference that there was no legal necessity for having these goods on credit. But it seems to me that that inference is an inference really of law to be drawn upon those facts. It does not follow that because cash was coming into the hands of the trustees, they were able to pay for the goods when they got them, unless it is known what their other liabilities were at the time. It cannot be said with any certainty that there was sufficient cash on hand to pay for the goods. And, moreover, we know this that the trustees of the temple were quarrelling and one of them was withholding the money of the temple and at any rate no payment was made and the trustees were very glad to take the very long credit which was given to them by the plaintiff.

Another argument pressed upon us is that there was no contract, as it is argued there must be, by the trustees to make the temple funds liable for these debts. But that argument cannot prevail in the face of the very strong facts. Ex. L series show that written orders were given to the plaintiff for the supply of these articles, that those orders were written on paper headed the Sri Sarangapaniswami Devasthanam and were signed at the end by one or other of the trustees as trustee That, in itself, to my mind, is a clear indication that the articles ordered were ordered for the purpose of the temple by a person entitled in the ordinary course of his duties to order them and that the temple funds were to be liable for the payment of those articles. Any other construction of these documents, I think, would be absurd. Therefore, it seems to me perfectly clear that the trustees contracted that the goods would be paid for out of temple funds. The learned District Munsif himself points out in paragraph 10 how it was that these goods were ordered and he refers to one important matter, namely, that in the books of the temple themselves the money for these goods was entered as a debit against the temple funds. I cannot see how the Privy Council decision in *Vibhudapriya Thirthaswamiar* v. *Lakshmindra Thirthaswamiar*[2] is inapplicable to this case. I think that no real distinction, so far as the necessity for borrowing is concerned, can be drawn between the Swami of a

2 (1927) L.R. 54 I.A. 228: I.L.R. 50 M 497: 53 M.L.J. 196 (P.C).

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mutt and the trustee of a temple. Under these circumstances, I feel myself bound by that decision and this appeal must, therefore, be allowed with costs throughout.

The Subordinate Judge did not decide two other matters raised in the appeal before him, namely, the question of limitation and the right of the plaintiff to get interest. With regard to the former, Mr. Srinivasavaradachari says that he is not in a position to press the point and with regard to the latter he has made a suggestion that the rate of interest should be reduced to 6 per cent. and to this Mr. T. R. Ramachandra Aiyar agrees. Therefore, the decree of the District Munsif will be restored except with regard to the rate of interest which is reduced to 6 per cent.

Pakenham Walsh, J.

Pakenham Walsh, J.—I entirely agree with the judgment my Lord the Chief Justice has just delivered and I would only like to add the following points. In the case in ***Lakshmindra Thirthaswamiar* v. *Vibhudapriya Thirthaswamiar***[1], which was reversed on appeal by the Privy Council in ***Vibhudapriya Thirthaswamiar* v. *Lakshmindra Thirthaswamiar***[2]. Krishnan, J., laid it down that mutt properties in the hands of a matathipathi will not be liable for the debts of his predecessor either on the ground that the borrowing was for a purpose which was not justifiable at all or on the ground that though the purpose was a legitimate one the predecessor had enough funds of the mutt in his hands at the time and, therefore, had no necessity to borrow at all to meet the expenses. As regards the facts found in that case on that point, it may be said to have been found that the mutt would have had Rs. 1,00,000 in hand but they incurred a debt of Rs. 1,30,000. The Court found it unnecessary to pursue the question further under this head as they held that the expenses were for illegitimate purposes. Therefore, when their Lordships of the Privy Council held that these expenses were legitimate they must by implication be held to have negatived the proposition that the mere fact that the mutt may have had cash in its hands made the borrowing of money for legitimate expenses a charge which could not be recovered from the temple, because it is clear that had they shared the view of Krishnan, J., on this point, they must have found that as regards the Rs. 1,30,000 borrowed, the temple was not chargeable to the extent of Rs. 1,00,000 which the mutt had as money in

1 (1922) 44 M.L.J. 187.

2. (1927) L.R. 54 I.A. 228: I.L.R. 50 M. 497: 53 M.L.J. 196 (P.C.).

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hand. As I agree with my Lord that there is no distinction in this matter between the matathipathi of a mutt and the trustee of a temple, it follows that this test propounded by Krishnan, J., has not to be satisfied. As to this decision applying to a temple, we find their Lordships themselves refer to the case of *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi.*[5] That no doubt is the case of a matathipathi of a mutt but he was in that particular transaction acting as the trustee of a temple. This is an indication that they did not intend to draw any distinction in principle which they enunciated between a mutt and a temple. I may also refer to the remarks of their Lordships in *Niladri Sahu* v. *Mahant Chaturbhuj Das*[6]. They say as follows:

"The learned Judges of the High Court appear to their Lordships to be rather of opinion that the procurement of a loan of money on easy terms for the purpose of paying off antecedent loans obtained on very oppressive terms can never, in a case of this character, be held to be a necessary proceeding unless the obtaining of the oppressive loan was, at the time it was obtained, a matter of necessity also If these learned Judges held that view, their Lordships cannot agree with them"

From that it would seem to follow that the mere fact that a temple trustee may have money in his hands would not *per se* render the raising of a loan a charge which cannot be attached to the temple. It would appear for example from this that the temple might under necessity have raised a loan of Rs. 1,000 at 50 per cent. and been able the next day to raise a loan of a similar amount at 25 per cent. and that though they had this Rs. 1,000 in hand they could raise a second loan to pay off the first Therefore, the principle that no loan raised would attach liability to the temple merely from the fact that there may have been ready money in hand equal to the amount of the loan to be raised seems to be too wide. The only other fact that I would like to notice in this case is that the Receiver had already paid under orders of Court a sum of Rs. 3,000 to this very plaintiff as part of the bill and under those circumstances the temple has certainly been put to considerable loss by contesting the decision of the District Munsif as to this small portion.

B.V.V. *Appeal allowed.*

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5. (1917) L R. 44 I.A. 147: I.L.R. 40 M 709: 33 M.L J. 1 (P.C.)
6. (1926) L.R. 53 I.A. 253: I.L.R. 6 Pat 139 at 151 51 M L J 822 (P.C)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE REILLY.

Chaturbujadoss Kushaldoss & Sons .. *Appellants** (*Defendants*)

v.

Minor Rajamanicka Mudali by father and next friend Ekambara Mudaliar and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Chaturbujadoss Kushaldoss & Sons *v.* Rajamanicka Mudali.

Decree—Execution of—Against the widow of the debtor—Ignorance of will—Residuary legatee, the legal heir—How far and under what circumstances a decree against a wrong legal representative can be binding on the true heir of a deceased person

The 1st defendant obtained a decree in a suit on the file of the Original Side of the High Court for a sum of money due to him from a deceased person whose widow was brought on record as his legal representative in the suit as she held succession certificate in her name He brought the suit properties to sale in execution thereof and the 2nd defendant purchased them Meanwhile the plaintiff had already, before the filing of this suit by the 1st defendant in a suit against the widow brought by him on the file of the Court of the Subordinate Judge of Vellore, tried to establish his rights as a residuary legatee of the deceased person under a will. After the suit brought by the 1st defendant was decided in his favour by the High Court, the suit by the plaintiff at the Vellore Court was decided and, as a result, he became the residuary legatee of the deceased Plaintiff brought the present suit to upset the execution sale and to escape payment of the debt, on the grounds that the wrong person was impleaded in the suit brought by the 1st defendant, and that the decree was obtained by the 1st defendant during the pendency of his own suit to establish his rights against the widow

Held that, in the circumstances of the case, namely, the 1st defendant believed *bona fide* that the widow was the legal heir of the deceased and that the decree was obtained by him without fraud or collusion, the widow sufficiently represented the estate of the deceased in the suit brought by the 1st defendant and that the decree obtained in it and the execution proceedings were binding upon the plaintiff in respect of all the items of property involved in the suit.

Case-law discussed

If the widow was properly sued as the legal representative of the deceased in the suit brought by the defendant and if she sufficiently represented his estate, then the decision in that suit could not affect the rights of the present plaintiff in any way, for he claimed the property only as the legal representative of the deceased and the interests of both the widow and the plaintiff were identical as regards the subject-matter of the litigation in the suit by the defendant. The decision in that suit being in effect a decision against the plaintiff himself, it could not affect his rights as the legal representative of the deceased.

Appeals against the decree of the Court of the Subordinate Judge of Vellore in Original Suit No. 86 of 1922.

*Appeals Nos. 250 and 332 of 1925 1st May, 1930.

Chaturbhujadoss Kushaldoss & Sons v. Rajamanicka Mudali.

S. Doraiswami Aiyar, M. A. Tirunarayanachariar and *A. K. Ramachandra Aiyar* for appellants.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for respondents.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS. *Madhavan Nair, J.*—The 1st defendant is the appellant in Appeal No. 250 of 1925 and he is the decree-holder in C.S. No. 81 of 1921 on the file of the High Court, Madras. The 2nd defendant is the appellant in Appeal No. 332 of 1925 and he is the auction purchaser of the properties sold in execution of the decree in C.S. No. 81 of 1921. These appeals arise out of a suit instituted by the plaintiff for a declaration that the decree in C.S. No. 81 of 1921 and the attachment and sale held in execution of that decree are not binding on him.

The facts are briefly these. One Parthasarathi Mudali who was doing business in yarn and cloths had dealings with the 1st defendant, Kushaldoss & Sons, and owed them a considerable sum of money. He died on the 18th May, 1920, leaving a will, dated 14th May, 1920. By this will the plaintiff, his nephew, was given the whole estate of the testator subject to the other dispositions mentioned in it. After the death of Parthasarathi Mudali, his widow Sengalani Ammal applied on 5th October, 1920, for a succession certificate in order to enable her to collect the outstandings due to him. The plaintiff's father as his guardian objected to the issue of the certificate. But an order was passed in favour of the widow as the counter-petitioner said that he intended to file a separate suit to establish his rights under the will and that he had no objection to the petitioner being given the certificate provided she furnished substantial security. On 22nd December, 1920, O.S. No. 65 of 1921 on the file of the Court of the Subordinate Judge of Vellore was filed by the plaintiff to establish his rights. It was disposed of in his favour on 24th April, 1922. Meanwhile, on 31st January, 1921, that is, after the institution of O.S. No. 65 of 1921, the present 1st defendant filed C.S. No. 81 of 1921 on the file of the High Court against Sengalani Ammal, the widow of the deceased Parthasarathi Mudali as representing her husband's estate, for the recovery of money due from Parthasarathi Mudali. The suit was heard and decided *ex parte* on 30th March, 1921, *i.e.*, before the disposal of O.S. No. 65 of 1921. The decree directed that

Chaturbuja-doss Kushaldoss & Sons v. Rajamanicka Mudali. Madhavan Nair, J.

"Sengalani Ammal, the defendant . . . . do from and out of the assets of her deceased husband Parthasarathi Mudali, come to her hands do pay to the plaintiffs the sum of Rs. 3,518-11-0, etc"

This decree was transferred for execution to the Court of the District Munsif of Ranipet on 3rd July, 1922, and sale of the suit properties was posted to 28th August, 1922. As the plaintiff had by that time obtained a decree in his favour he intervened in execution proceedings and wanted to be brought on record in order to oppose the execution, but as his petition was filed on the day fixed for sale of the properties it was dismissed as being too late. The sale proceeded and the 2nd defendant purchased the suit properties for a sum of Rs. 3,850. It is the decree in C.S. No. 81 of 1921 on the file of the High Court and the execution sale in favour of the 2nd defendant which the plaintiff now contends do not bind him.

His case is that the 1st defendant was well aware when he instituted C.S. No. 81 of 1921 that he was the true legal representative and the residuary legatee under the will, of the deceased Parthasarathi Mudali, and knowing that, he instituted that suit in collusion with Sengalani Ammal, the widow, in fraud of the plaintiff's rights, and that she allowed the decree for the principal and interest to be passed *ex parte* without contesting the claim for interest which she could have successfully resisted if the case had been properly conducted. These grounds are alleged to show that the decree obtained b[illegible] [illegible]efendant against Sengalani Ammal could not be regarded [illegible] [illegible]ecree obtained *bona fide* and without fraud or collusion and therefore cannot bind the plaintiff who is the real heir of Parthasarathi Mudali. It is also alleged that the execution proceedings in connection with the sale of the properties were not carried on *bona fide*. These allegations are denied by the defendants. The claim of the 1st defendant for the principal sum is admitted by the plaintiff.

The learned Subordinate Judge found that in the matter of the institution of the suit there was no collusion between the 1st defendant and Sengalani Ammal and that there was no evidence that the 1st defendant was actuated by any fraudulent motive in instituting the suit against the widow. He held that interest was rightly claimed in that suit by the 1st defendant and the claim for interest, therefore, cannot be considered to be a fraud perpetrated upon the estate of Parthasarathi Mudali. Notwithstanding these findings, the learned Subordinate Judge came to the conclusion that the decree was not obtained *bona*

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fide and cannot bind the present plaintiff on the ground that the 1st defendant had opportunities of finding out the true legal representative of the deceased Parthasarathi Mudali and that he instituted the suit without making sufficient enquiries. His conclusion might be stated in his own words:

> "The conclusion that must be adopted is that C.S. No 81 of 1921 was instituted against Sengalani Ammal without enquiry as to who was Parthasarathi's real heir when there was every opportunity to make such enquiry and when if such enquiry had been made in the right spirit and in the proper way it would disclose the fact. It cannot be regarded as a suit instituted *bona fide* against the widow as heir"

As regards the 2nd defendant's participation in the proceedings, the learned Judge held that he purchased the suit properties knowing that there was a will set up by the plaintiff constituting him as the legal heir of Parthasarathi Mudali. He also held that the 2nd defendant had no hand in the matter of filing C.S. No. 81 of 1921 and that the properties purchased by him were not sold for an inadequate price. As a result of these findings a decree was given in favour of the plaintiff as prayed for.

In appeal it is argued on behalf of the appellants that the circumstances of the case would show that the 1st defendant instituted this suit against Sengalani Ammal in the full belief that she was the true legal representative of the deceased Parthasarathi Mudali and that he made sufficient enquiries before instituting the suit; and that his conduct in connection with the suit and its proceedings was throughout *bona fide*. On behalf of the plaintiff-respondent it is argued that the Judge's finding that interest was properly decreed in the prior suit is not supported by the evidence, and that the properties were sold for an inadequate price, and that even if it is held that the decree against the widow was obtained by the 1st defendant *bona fide* and without fraud and collusion, in law the decree is not binding on him as it was not obtained against him, he being the true legal representative of the deceased Parthasarathi; and that if binding at all, it will be binding only as regards items 3 and 4 which are in the possession of the widow. It was also argued having regard to section 52 of the Transfer of Property Act, effect should not have been given to the decision in C.S. No. 81 of 1921, as it was decided during the pendency of O.S. No. 65 of 1921, which ended in his favour.

I shall first deal with the question whether the claim for interest was rightly allowed by the Court in C.S. No. 81 of

1921. The learned Subordinate Judge has found in favour of the appellant on this point. I cannot say that the evidence in the case does not support the conclusion of the Subordinate Judge. The witnesses who speak in support of the claim for interest are D.Ws. 1 and 2. Their evidence is to the effect that Parthasarathi Mudali was liable to be charged interest on his money dealings with the 1st defendant's firm and that he was not charged interest for a considerable time; but that in 1919 he was specifically told that he would be charged interest in future. Reading the evidence of these two witnesses carefully I fail to see any real inconsistency in their statements. It is true, as may be seen from the accounts, that Parthasarathi Mudali was not charged interest up to 1919; but the liability to pay interest always existed and that was enforced from 1919 onwards. Exs. I, IV and V support the 1st defendant's claim for interest in C.S. No. 81 of 1921. In Ex. I, the *patti*, dated 19th April, 1920, it is stated that interest will be charged on the amount specified in it at the rate of 9 per cent. per annum. Ex. IV, a letter from the 1st defendant to Parthasarathi Mudali, dated 30th April, 1920, distinctly states that interest will be charged up to date. Ex. V, a card, dated 10th June, 1920, was written subsequent to the death of Parthasarathi Mudali. It is curious that by that time though the 1st defendant must have known about the death of Parthasarathi Mudali, the card was addressed to him. No satisfactory explanation has been given for this proceeding, but I am not satisfied that this is an indication of fraudulent conduct on the part of the 1st defendant. This letter also says that if the account is not settled, interest will be recovered. In thus declaring that interest will be claimed this is quite consistent with Exs. I and IV. As no large amount was due from Parthasarathi Mudali to the 1st defendant in 1919, the demand for interest thereafter may no doubt appear to be somewhat unreasonable. But it does not follow from this that the defendant's evidence regarding the agreement on the part of Parthasarathi Mudali to pay interest thereafter should necessarily be disbelieved as the liability to pay interest always existed though it was not enforced till 1919. This point is dealt with by the learned Subordinate Judge in paragraph 11 of his judgment. On the whole I am inclined to agree with him on his finding on this point. It therefore follows, the claim for principal being admitted, that Sengalani Ammal's failure to resist C.S. No. 81 of 1921 was in no way detrimental to the interests of the estate of Parthasarathi Mudali.

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The next question for consideration is whether the 1st defendant knew at the time when he instituted the suit that a will was left by Parthasarathi Mudali and that the plaintiff was his true legal heir. The plaintiff's case that the death of Parthasarathi Mudali and the fact that he died leaving a will were brought to the notice of the 1st defendant soon after Parthasarathi's death has been disbelieved by the learned Subordinate Judge. It was not seriously argued by the respondent that on this point the learned Subordinate Judge's conclusion is wrong. The 1st defendant's case is that he knew of the death of Parthasarathi only in July, 1920, when he went to his village and sold some of his properties. But it is clear from the evidence as pointed by the learned Subordinate Judge that he must have known about it some time earlier in June but this does not affect the *bona fides* of his conduct in instituting the suit against the widow. The evidence does not show that the 1st defendant or his agents knew anything about the succession certificate proceedings before the institution of the suit. When his agents went to the village of Parthasarathi in July, 1920, the evidence is to the effect that they learnt that Parthasarathi's only heir was Sengalani Ammal, his widow; that they did not hear anything about the will and that they obtained the keys of the shop of Parthasarathi from Sengalani Ammal. Some yarn was sold on that occasion and the 1st defendant was able to realise a sum of Rs. 1,500 towards his dues. It appears from the plaint that Sengalani Ammal is in possession of items 3 and 4, though the point is disputed by the respondent. I do not think it can be seriously contended that she was not in possession of these items when the 1st defendant instituted his suit. But for the will it is clear that Sengalani Ammal would be the heir of Parthasarathi entitled to represent his estate. This fact coupled with other facts already referred to that Sengalani Ammal was in possession of some items of property belonging to her husband, that the keys of the shop were obtained from her, may well be considered as sufficient justification for the conduct of the 1st defendant in instituting the suit against her as Parthasarathi's legal representative. The Subordinate Judge does not say that the 1st defendant's agents refrained from making any enquiries. His opinion seems to be that if they had made fuller enquiries they might probably have known of the existence of the will and that the plaintiff was the real heir of the deceased. Probably this might have been so. But I cannot accept the argument having regard to the circumstances

referred to above, that the 1st defendant's failure to prosecute more detailed enquiries should necessarily lead to the conclusion that in instituting the suit against the widow he was not acting *bona fide*. All the facts then known to him and present before his mind pointed out that Sengalani Ammal was the legal representative of the deceased. The agents of the 1st defendant seem to have made some enquiries though the evidence on the point is not quite definite. In this connection it is important to notice that the 1st defendant does not improve his position in any way by making the widow the legal representative of the deceased Parthasarathi and by refraining from making enquiries as to who his true legal heir is. The learned Subordinate Judge has found that there was no collusion of any kind between the widow and the 1st defendant in the matter of the institution of the suit. We have not been referred to any evidence in support of any collusion. It is admitted that the amount claimed except as regards interest was really due from Parthasarathi to the 1st defendant and as regards interest we have found that the claim has been substantiated. In these circumstances why should the 1st defendant not to have sued the plaintiff as a defendant in C.S. No. 81 of 1921 instead of the widow if he really knew that there was a will and that the plaintiff was really the legal representative of Parthasarathi? No satisfactory answer has been given by the respondent to this question except that the suit was brought at the instigation of some of the enemies of the deceased Parthasarathi. In these circumstances I cannot agree with the opinion of the Lower Court that it cannot be regarded that C.S. No. 81 of 1921 was instituted *bona fide* against a wrong heir. In my opinion the evidence in the case shows abundantly that the suit C.S. No. 81 of 1921 was instituted by the 1st defendant *bona fide* against the widow as the legal heir of the deceased Parthasarathi and that there is nothing fraudulent in the conduct of the 1st defendant or the widow in connection with the proceedings in the suit and that the decree was obtained without fraud and collusion.

As regards the value realised at the time of the sale, I agree with the learned Subordinate Judge that the value is not inadequate. He has considered the matter in paragraph 17 of his judgment, and I do not think I can add anything to that discussion.

For the above reasons, I would hold that the widow Sengalani Ammal sufficiently represented the estate of the

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deceased Parthasarathi in C.S. No. 81 of 1921 and that the decree in that suit is binding on the plaintiff.

Mr. Viswanatha Aiyar next argues as a proposition of law that even if C.S. No. 81 of 1921 was instituted by the 1st defendant *bona fide* against a wrong heir and even if there be no fraud or collusion between the parties in respect of that suit, still the decree passed in the suit cannot be considered binding on the true legal representative (that is, the plaintiff) and if it is binding at all, it will be binding only with respect to the properties of the deceased which were in possession of the widow at the time of the suit, that is, only items 3 and 4 in the suit. In support of this argument he relied strongly on *Madavarayudu* v. *Subbamma*[1], *Gnanambal Ammal* v. *Veerasami Chetti*[2], *Kaliappan Servaikaran* v. *Varadarajulu*,[3] *Srinivasa Aiyangar* v. *Kanthimathi Ammal*,[4] *Bachu Soorayya* v. *Toomuloori Chinna Anjaneyalu*[5] and *Angadi Mallappa* v. *Neelana Gowdra Kare Gowd.*[6]

The question how far and under what circumstances a decree passed against a wrong heir of a deceased person will bind his true heir has been considered in various cases. *Prima facie* a decree will bind only the parties to it or those claiming through them; but there are exceptions to this rule. The Courts have held that in certain circumstances when one who is not the true legal representative of a deceased person is impleaded as his legal representative then a decree passed against him in his character as the legal representative of the deceased would be binding on the true representative though he is not a party to it. The suit may have been instituted against the wrong legal representative at the very commencement or the wrong legal representative may have been brought on record during the pendency of the suit or after the decree and for purposes of execution. An examination of these cases will show that in deciding the point the learned Judges put before themselves the question whether the estate was sufficiently represented by the alleged legal representative on record as the important factor for consideration and this, they answered in the affirmative, if it was found that the suit was instituted *bona fide* against the alleged legal representative and the decree was obtained without any fraud or collusion between the parties.

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1 (1916) 31 M L.J 222. 2 (1915) 29 M.L.J. 698
3. (1909) I.L.R. 33 M 75: 19 M L.J. 651
4. (1910) I.L.R. 33 M. 465 5. (1918) 36 M.L.J. 106
6. (1925) 50 M.L.J. 442

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In *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*[7] the suit was brought against a widow as the mother and guardian of her son who was then a minor, to recover arrears of rent due from his deceased father. It was held by the Judicial Committee that the decree obtained against the widow as the legal representative of her husband was binding on the son, who in law was the true legal representative of the deceased, though the suit was not prosecuted against him.

The Privy Council decision entirely approved of the decision in *Johan Chunder Mitter* v. *Baksh Ali Soudagur*.[8] In that case, which is the earliest one mentioned in the Reports, it was held that the decree obtained against a Hindu widow for her husband's debt was binding on the son who was not a party to the suit. It would seem from the Reports that the plaintiff knew of the existence of the son when he sued the widow. The judgment shows that the question for consideration was whether the widow sufficiently represented the estate of the deceased. This is really the point that has to be decided in cases of this description.

In *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar*[9] the defendant died during the pendency of the suit and only one of his sons was brought on record as his legal representative. It was held that the share of the second son also was bound by the decree in the suit notwithstanding the fact that he was not joined in the suit as one of the legal representatives of his deceased ather. The learned Judges based their conclusion on the following reasoning:

> "In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate."

It is true that this is not a case where a person was wrongly brought on record as the legal representative but it lays down a general principle.

In *Khiarajmal* v. *Daim*[10] the Judicial Committee pointed out that the question whether the estate is or is not properly represented is not a mere question of form but of substance. That also was not a case where a wrong legal representative was brought on record in the place of the deceased person, but

7. (1872) 14 M.I.A. 605: 20 E.R. 912.
8. Mar. Beng. A.C. 614.
9. (1902) I.L.R. 26 M. 230: 12 M.L.J. 368.
10. (1904) L.R. 32 I.A. 23: I.L.R. 32 C. 296 (P.C.).

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it was a case in which some of the legal representatives were brought on record with respect to one of the deceased persons and no legal representative was brought on record with respect to another person. In the case of the one, their Lordships held that the estate was sufficiently represented while in the other case they held that it was not represented at all.

In *Ramaswami Chettiar* v. *Oppilamani Chetti*[11] the defendant died after the decree and the plaintiff in the course of the execution proceedings brought on record as his legal representative one of two persons who appeared to have a better title at that time. It was held that the sale of properties in execution of the decree with such a person on record would bind the person who was subsequently found to be a true legal representative. The principle on which the decision is based is thus stated by the learned Judges:

"The creditor must, if he is not to be liable to lose his money, be permitted to apply for execution against that one of the rival claimants whom he honestly and reasonably believes to be the legal representative, and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceeding in question are identical with those of his rivals, and if he acts without fraud or collusion, it is hard to see any reason why his representation should not be held to be sufficient."

Later on speaking of the representation of the estate by the wrong person being brought on record they observe as follows:

"His interests were absolutely identical in this matter with those of his rivals and he was better able than they to protect them. There existed, therefore, no reason why if one of the claimants was to represent the estate it should not be he, and no fraud or collusion has been proved in this case to vitiate his representation. There is then no good reason why as the person with the best *prima facie* title, and holding possession of the property, Krishnaswami Panikondar should not be held to have sufficiently represented his natural son's estate in fact."

In my opinion there is no justification for confining the principle enunciated in this decision only to those cases where a wrong representative is brought on record in the course of the execution proceedings. The question to be considered whether it arises in the course of execution proceedings or in the course of the suit is this: whether the estate of the deceased person was sufficiently represented by the legal representative who has been actually brought on record. I think the same principle should govern all cases where a wrong representative has been brought on record, where such representative has been added in the course of the suit or in the course of the execution proceedings. The same consideration should

11. (1909) I.L.R. 33 M. 6: 19 M.L.J. 671.

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apply also to a case where the suit itself is instituted against the wrong legal representative at the very commencement. The principle of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetti*[11] has been applied to a case in *Gnanambal Ammal* v. *Veerasami Chetti*[2], where the suit itself was instituted against a wrong legal representative of the deceased person as in the case before us. Referring to these decisions Sadasiva Aiyar, J., in that case observes as follows:

"In that same volume (*Ramaswami Chettiar* v. *Oppilamani Chetti*[11], a case is reported which was argued by eminent Vakils on both sides and it was held therein that a decree-holder may select from among several rival claimants to the estate of his judgment-debtor any one whom he believes honestly to have the best *prima facie* title as legal representative and that that representation in the absence of fraud or collusion will be sufficient to validate sales held in execution and to convey the title of the deceased judgment-debtor through such sales. The broad principle of the decision in that case clearly seems to me to apply to the present case."

If the principle of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetty*[11] applies to the case before us, as I think it does, there can be no doubt having regard to the findings given above that the decree against the widow who has a *prima facie* title to represent the estate and whose interests in respect of the suit are identical with those of the plaintiff must be considered to be binding on the plaintiff. It was argued that the decisions in *Ramaswami Chettiar* v. *Oppilamani Chetty*[11] and in the prior cases are no longer good law as the wording of section 368 of the old Code which was in force when those cases were decided has been altered in the present Code. O. 22, R. 4 is no doubt differently worded but I do not think it was intended to introduce any new principle by the alteration in the language. As pointed out in *Dip Narain Rai* v. *Lachman Upadhiya*[12] O. 22, R. 4 reproduces with no change in principle section 368 of the old Code as amended in 1888.

In *Kaliappan Servaikaran* v. *Varadarajulu*[3], a case very much relied on by the respondent, a suit was brought against *A*, the widow of the deceased person as his representative and a decree was passed directing the recovery of the sum sued for from the estate of the defendant's deceased husband in her hands. Another person *B* brought a suit against *A* to establish his title to the property of the deceased and having obtained a decree in his favour took possession of the estate. The decree-holder then sought to execute the decree against *B* under section

2. (1915) 29 M.L.J. 698.
3 (1909) I.L.R. 33 M 75: 19 M.L.J. 651.
11. (1909) I.L.R. 33 M. 6: 19 M.L.J. 671.
12. (1925) I.L.R. 47 A. 466.

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252 of the Code of Civil Procedure. It was held that the decree was not against the estate but against *A*, the legal representative, and was capable of execution only against *A* and her representatives. Thus stated, the decision no doubt supports the respondent, but Sadasiva Aiyar, J., points out the true scope of this decision in *Gnanambal Ammal* v. *Veeraswami Chetty*[2] to be this: what was decided in that case was that the true legal representative cannot, after decree, be brought on the record for purpose of execution and that the deceased debtor's property in his hands cannot be attached and sold in that same suit. Further on, he points out that the decision is not to be taken as having decided that if the wrong representative had been *bona fide* added or sued and a decree had been obtained and the property of the deceased had been brought to sale, the sale itself was invalid, and could not affect the estate of the deceased (*see* page 703).

If the decision is not read in this way, it really will not be reconcilable with the decisions in *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*[7] and *Ramaswami Chettiar* v. *Oppilamani Chetty*[11]. In this view, it is clear that this decision does not support the respondent. Further, in the present case, the respondent has not obtained possession of the properties in execution of his decree. The decision in *Srinivasa Aiyangar* v. *Kanthimathi Ammal*[4] followed *Kaliappan Servaikaran* v. *Varadarajulu*[3] and does not require further comment.

In *Gnanambal Ammal* v. *Veeraswami Chetty*[2], the case just referred to, "where a creditor of the estate ignorant of the true state of affairs, sued the widow in possession and the illegitimate son who would have been the legal representative but for a will left by the debtor under which the 1st defendant was constituted executor and the plaintiff a legatee and obtained a decree and in execution the property in possession of the widow was purchased by the plaintiff, it was held that the sale was binding against the plaintiff." In that case the suit itself was instituted against the alleged legal representative of the deceased person and that legal representative, his widow, was in possession of one item of his properties. The question was whether the decree obtained against the widow which related to this item was binding on the true

2. (1915) 29 M.L.J. 698

3. (1909) I.L.R. 33 M. 75: 19 M.L.J. 651. 4. (1910) I.L.R. 33 M. 465.

7. (1872) 14 M.I.A. 605; 20 E.R. 912.

11. (1909) I.L.R. 33 M. 61: 19 M.L.J. 671

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heir. The learned Judges relied upon *Ramaswami Chettiar* v. *Oppilamani Chetty*[11] and the decision of the Privy Council in *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*[7] in support of their conclusion that the sale was binding against him and in doing so they referred to the "broad principle" of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetti*[11] already referred to. They also rely on the definition of the term "legal representative" in the new Code of Civil Procedure. I am mentioning this circumstance to show that the decision in that case was based not solely on the ground that the widow was a legal representative of the deceased person as being in possession of the item of properties involved in the suit but was based also upon the broad principle that if the wrong heir is sued *bona fide* and the decree is not tainted with fraud and collusion, then the true heir is also bound by that decree. The words "I would further remark" in para. 2 at page 703 would show that the definition of "legal representative" in the new Civil Procedure Code was relied on only as an additional reason in support of the conclusion arrived at by applying the general principle enunciated in *Ramaswami Chettiar* v. *Oppilamani Chetty*[11] and *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*[7]. This decision was referred to in *Bachu Soorayya* v. *Toomuloori Chinna Anjaneyalu*[5], to which also Sadasiva Aiyar, J., was a party. The judgment in this case also makes it clear that the new definition of the legal representative was relied on only as a supplemental ground in support of the conclusion arrived at in *Gnanambal Ammal* v *Veeraswami Chetty*[2]. These two cases, *Gnanambal Ammal* v. *Veeraswami Chetty*[2] and *Bachu Soorayya* v. *Toomuloori Chinna Anjaneyalu*[5], do not in my view support the proposition contended for by the respondent's counsel that if the decree in question can be held to be binding, it will be binding *only* with respect to items 3 and 4 which are in the possession of the widow, for these cases approve the broad principle stated in *Ramaswami Chettiar* v. *Oppilamani Chetty*[11] and *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*[7] which do not limit the application of the principle in the way contended for by the respondent.

The decision in *Madavarayudu* v. *Subbamma*[1] is the case strongly relied on by the respondent in support of his plea that

1 (1916) 31 M.L.J. 222. 2 (1915) 29 M L.J. 698
5 (1918) 36 M.L.J. 106. 7. (1872) 14 M.I.A. 605: 20 E.R. 912.
11. (1909) I.L.R. 33 M 6: 19 M.L.J. 671.

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the decree passed against the wrong heir of the deceased *will not in any circumstance* be effective against the true heir. If that decision lays down that proposition, then certainly the decision is opposed to the prior decisions of this Court; but an examination of that case will show that it is perfectly consistent with the prior decisions of this Court and that it does not support the appellant. In that case when the defendant mortgagor against whom the suit was instituted died, his divided brother's son was brought on the record as his legal representative while the true legal representative was his daughter. No reason was assigned as to why she was ignored. The person brought on record as the legal representative was practically a stranger. In the circumstances, the learned Judges held that the decree obtained against such a person cannot be binding on the true legal representative. In the course of their judgment, the learned Judges after referring to *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*[7] make the following observation:

> "In any case the widow against whom the proceedings were continued had a 'present interest' to protect and consequently that decision is within the principle enunciated in *Ramaswami Chettiar* v. *Oppilamani Chetti*[11]."

This shows that they approved of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetti*[11] which lays down the broad principle I have already referred to. The decision in *Madavarayudu* v. *Subbamma*[1] must be read with reference to its special facts. So long as the daughter the true legal representative was alive, the person who was actually made legal representative in the suit had no interest in the property and no reason was given as to why the daughter, the real legal representative, was overlooked by the plaintiff; *prima facie* a decree obtained against a person in such circumstances can never be described as a decree obtained *bona fide* and without fraud or collusion between the parties to the suit. The decision in *Angadi Mallappa* v. *Neelana Gowdra Kare Gowd*[6] does not go further than *Madavarayudu* v. *Subbamma*[1] and must be read with special reference to the facts of the case. Attention may be drawn to the observations of Srinivasa Aiyangar, J., about this decision in *Kolarematthu Amma* v. *Madhavi Ammal*[13]. If a person who is practically in the position of an absolute stranger and who has no sort of right to represent the deceased

1. (1916) 31 M.L.J. 222.
6 (1925) 50 M.L.J. 442.
7. (1872) 14 M.I.A. 605: 20 E.R. 912
11. (1909) I.L.R. 33 M 6: 19 M.L.J. 671.
13. (1927) M.W.N. 894.

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is made a party to a suit and a decree is obtained against him as representing the deceased such a decree, however *bona fide* the suit may be, cannot bind the real heir. This is all what the decisions in *Madavarayudu* v. *Subbamma*[1] and *Angadi Mallappa* v. *Neelana Gowdra Kare Gowd*[6] mean. These decisions cannot possibly apply to the case of a widow who in the absence of a will is the legal representative of her deceased husband and against whom a decree has been obtained *bona fide* by the creditor.

Many of the above decisions have been fully considered in a recent decision of this Court in *Sanna Govappa* v. *Rodda Sanna Govappa*[14], in which the learned Judges have enumerated all the circumstances in which a decree obtained against the wrong heir of a deceased person can be considered effective against the true heir who was not made a party to the suit (*see* pages 783 and 784); various decisions of single Judges of this Court and a few decisions of other Courts, *Garapati Gangaraju* v. *Pandyala Somanna*[15], *Narasimaiah* v. *Jawantharaj Sowcar*[16] *Abdulla Sahib* v. *Vageer Beevi Ammal*[17], S.A. No. 210 of 1924, S.A. Nos. 1155 of 1924 and 757 of 1925, *Lalsa Rai* v. *Udit Rai*[18], *Premraj* v. *Javarmal*[19], *Pukhraj* v. *Jamsetji*[20] and *Jagarnath* v. *Mt. Bibi Amir-un-nissa*[21] were brought to our notice. But having regard to the cases above discussed which are decisions of this Court by benches of two Judges, I do not think it is necessary to examine them. Now to sum up, the widow who was sued as the legal representative in C.S. No. 81 of 1921, was, but for the will, the true legal representative of the deceased; she was also in possession of at least two items of his properties. Her interests in defending the suit were identical with those of the plaintiff-respondent. The suit was instituted without any fraud or collusion between the parties. No more sum than was properly due from the deceased was claimed in that suit and as we have now found, the decree was obtained *bona fide* and without any fraud or collusion. In these circumstances it must be held that according to the decisions of this Court the widow sufficiently represented the estate of the deceased in C.S. No. 81 of 1921 and that the decree obtained in it and the execution proceedings

1. (1916) 31 M L.J. 222. 6 (1925) 50 M L.J. 442.
14. (1928) 30 L.W. 778 at 781. 15. (1926) M.W.N. 213.
16. (1926). 52 M.L.J. 299. 17 A.I.R. 1928 M 1199.
18. A.I.R. 1924 A. 717 75 I.C. 114.
19. (1912) 15 Bom. L.R. 41. 20. (1926) I.L.R. 50 B. 802.
21. A.I.R. 1928 Pat. 197.

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are binding on the plaintiff in respect of all the four items of property involved in the present suit.

It was lastly argued that with reference to section 52 of the Transfer of Property Act, the attachment and sale of the properties in execution of the decree in C.S. No. 81 of 1921 should not be given effect to, having regard to the fact that the suit was decided during the pendency of O.S. No. 65 of 1921 instituted by the plaintiff. This point was not raised in the Lower Court and does not seem to have been ever raised in any of the cases discussed above. In my view, the argument is clearly untenable. If, as we have found, the widow was properly sued as the legal representative of the deceased Parthasarathi in C.S. No. 81 of 1921 and if she sufficiently represented his estate, it is clear that the decision in that suit cannot affect the rights of the present plaintiff in any way for he claims the property only as the legal representative of the deceased Parthasarathi, and the interests of both the widow and himself are identical as regards the subject-matter of the litigation in C.S. No. 81 of 1921. The decision in that suit being in effect a decision against the plaintiff himself, it is difficult to see how that decision can affect his rights as the legal heir of the deceased as declared in O.S. No. 65 of 1921.

In the result both the appeals are allowed with costs here and in the Lower Court. In the circumstances of this case I hold that the next friend shall also be liable with the plaintiff for costs.

Reilly, J.

Reilly, J.—This appears to me a vexatious suit. It admitted that the principal of the debt, for which the firm called defendant 1 in this suit got a decree in C.S. No. 81 of 1921 on the file of the High Court, was due from the estate of Parthasarathi Mudali. I agree that we have no sufficient reason to differ from the findings of the learned Subordinate Judge that the interest included in that decree was also due from Parthasarathi and that the part of Parthasarathi's property which was sold in execution of that decree was not sold for an inadequate price. The result is that for Parthasarathi's debt a not excessive part of Parthasarathi's estate has been sold in execution. That can have done no harm to the plaintiff, who is Parthasarathi's residuary legatee. But the plaintiff is trying to upset the execution sale and to escape the payment of the debt on the ground that defendant 1 in C.S. No. 81 of 1921 did not implead Parthasarathi's proper representative as he impleaded Parthasarathi's widow, Sengalani Ammal,

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instead of the plaintiff. The learned Subordinate Judge has found that defendant 1 was guilty of no fraud nor collusion in the matter, and indeed, though fraud and collusion were alleged in the plaint, they were not properly pleaded and the allegations in that respect might well have been ignored. The learned Subordinate Judge has also found that defendant 1, when the firm brought the suit, did not know that Parthasarathi had left a will. Nevertheless he has found that the firm did not bring the suit against the widow as Parthasarathi's legal representative in good faith, because they did not make sufficient inquiry before doing so. I agree that that finding is wrong. Wills are not yet so common among the country people of this Presidency that a creditor whose debtor dies can be expected to inquire whether the debtor has left a will and what its dispositions are, if no one gives him information that a will has been made. In this case the creditor found that the debtor had left a widow but no children, that the widow was in possession of the debtor's shop and its contents and that she made several part payments towards the debt. The will, which was eventually found to have been validly made by Parthasarathi, was not mentioned in any Court until 6 months after Parthasarathi died and was not then brought to defendant 1's notice. In the circumstances defendant 1 appears to have acted in good faith in making the widow Parthasarathi's representative in C.S. No. 81 of 1921, and the extravagant suggestions which have been made before us that defendant 1, a firm of very wealthy Guzerati merchants in Madras, had a motive for using a wrong representative appear to me baseless. And, if defendant 1 had pushed inquiries further, what would have been discovered? It would have been found that 6 months after Parthasarathi's death the minor plaintiff's father on his behalf had asserted in answer to the widow's application to the District Court of North Arcot for a succession certificate that Parthasarathi had left a will, but had made no application for letters of administration; the widow had denied the genuineness of the will, and the District Judge had given her a succession certificate to collect amounts due to Parthasarathi's estate. The plaintiff through his father had then filed a suit, O.S. No. 65 of 1921, in the Vellore Subordinate Judge's Court, against the widow and two others for a declaration that he was entitled to Parthasarathi's property as residuary legatee under the will and for the recovery of Parthasarathi's property from them. If defendant 1 had known all that, the firm might still reasonably have maintained that, pending that litigation, the

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proper person for them to sue was Parthasarathi's widow, to whom the District Judge had issued a succession certificate; and such a choice among possible representatives of Parthasarathi could not have been attacked as improper.

But it is urged for the plaintiff that it has turned out subsequently, as he eventually succeeded in O.S. No. 65 of 1921, that the widow was not Parthasarathi's representative and therefore the decree obtained by defendant 1 in the High Court suit is ineffective. I may remark that even now in strictness there is no one who can be sued as completely representing Parthasarathi's estate, as no one has ever applied for letters of administration. But, though it has turned out subsequently that the widow has no right to Parthasarathi's property, she was sued by defendant 1 in good faith, and at that time she had an existing interest to defend that suit—indeed she was quite as much interested to do so as the plaintiff would have been. Then what ground have we for saying that a decree obtained against her as Parthasarathi's representative for a debt due from Parthasarathi is not binding on Parthasarathi's estate? The principle in such cases appears to me to be found in the *Durbhunga case*[7]. But, as the facts of that case are rather obscurely stated and have often been misunderstood in some particulars, I think it is better to refer to *Johan Chunder Mitter* v. *Buksh Ali Soudagur*[8], with which their Lordships of the Privy Council say in the *Durbhunga case*[7] they entirely agree. In that case a decree was obtained against a Hindu widow for her husband's debt, though he had left a son. It was held that the sale of her husband's property in execution of that decree was valid and bound the son. It does not appear that the widow ever set up any right against her son, and the report shows that the plaintiff knew of the son's existence when he chose to sue the widow. What Peacock, C.J., emphasized in that case was that the debt was her husband's and the property sold was her husband's. The widow was treated as having sufficiently represented her husband's estate. In many later cases the essential question whether the deceased's estate has been sufficiently represented appears to have been obscured by other considerations, and legal representatives have been treated as if it were their own rights and not the rights of the person whom they

7. (1872) 14 M.I.A. 605 : 20 E.R 912
8. Mar Beng. A.C. 614.

represent that were in question. I agree with my learned brother that the proper principle is to be found in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar*[9], *Ramaswami Chettiar* v. *Oppilamani Chetty*[11] and *Gnanambal Ammal* v. *Veeraswami Chetty*[2]. I do not think it necessary to discuss cases of the Bombay High Court or other Courts which adopt the view that the crucial question is whether the right heir or successor is on record, not whether the deceased's estate is sufficiently represented. And to my mind the question whether the representative on record is actually in possession of any of the deceased's property is not of importance except as throwing light on the question of the plaintiff's good faith. If a plaintiff in good faith sues a person who appears to him to be the proper legal representative of his deceased debtor and that representative has an existing interest to defend the estate and there is no fraud nor collusion in the proceedings, then a decree so obtained is binding on the deceased's estate whoever may be actually entitled to the residue of the estate after the debts have been paid. That appears to me to be both good sense and good law as laid down by the Privy Council.

It has been urged that the change of wording between section 368 of the Code of Civil Procedure of 1882 and O. 22, R. 4 of the present Code affects the validity of the old decisions on the subject. That contention appears to me to be ntirely mistaken. The words of the Code of 1882 and that 1859 may perhaps be taken to have given more freedom to a ntiff in bringing on record the representative he chose and words of the present Code to throw more responsibility in e matter on the Court. But that certainly cannot make a decree obtained after impleading a representative approved by the Court of less effect against the deceased's estate.

It has been suggested for the plaintiff that, as the decree of the High Court in C.S. No. 81 of 1921 only directed the widow to pay "out of the assets of her deceased husband, Parthasarathi Mudali, come to her hands," at any rate it cannot be executed against any property not in her possession, and that, as out of the four items sold in execution only items 3 and 4 were in her possession, the sale of items 1 and 2 in execution must be invalid. But that form of decree, which is the usual

2. (1915) 29 M L.J. 698.
9. (1902) I.L.R. 26 M 230: 12 M L.J. 368.
11 (1909) I.L.R. 33 M 6: 19 M.L.J. 671.

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form of decree against executors and administrators, is adopted only to make it clear that the decree is not to be executed against the representative, executor and administrator personally and that he is not directly responsible under the decree for property of the deceased which he has not yet recovered. It does not prevent the decree being executed against property of the deceased which has not been reduced to possession by the representative, executor or administrator. Items 1 and 2 in this case are admittedly Parthasarathi's property, and in my opinion they could be validly sold in execution of the decree in C.S. No. 81 of 1921.

The last contention for the plaintiff is that, as his suit, O.S. No. 65 of 1921, was instituted before C.S. No. 81 of 1921, the sale in execution of the decree in C.S. No. 81 of 1921 is invalidated on the principle of *lis pendens*. That I agree is mistaken. Although in O.S. No. 65 of 1921 the plaintiff incidentally obtained a decree that the widow and other defendants in that suit should deliver possession of items 3 and 4 to him and an injunction restraining them from interfering with his possession of items 1 and 2, the whole basis of his decree was the declaration, for which he sued, that he was the residuary legatee under Parthasarathi's will, that is, that he was entitled to the residue of Parthasarathi's estate after the payment of Parthasarathi's debts and the other legacies. The sale of items 1—4 in execution in no way affected his right a residuary legatee. The right of Parthasarathi's creditors the satisfaction of his debts was paramount to the rights of of the parties to O.S. No. 65 of 1921 and did not inde affect their rights.

Finally I may add that, if I had—as I have not—any reason to doubt the technical validity of the sale of items 1—4 in execution of the decree in C.S. No. 81 of 1921, in my opinion it would still not be proper to make for the plaintiff the declarations which he has sought in this suit that that decree and its execution are null and void against him. The plaintiff is not, as Mr. Viswanatha Aiyar in his argument represented him to be, the owner of Parthasarathi's property. He is merely the residuary legatee, entitled to the remainder of Parthasarathi's estate after all Parthasarathi's debts and the other legacies have been satisfied. It is not for him to say what parts of Parthasarathi's property shall go in satisfaction of his debts. By the execution of the decree in C.S. No. 81 of 1921 Parthasarathi's just debt has been paid out of Parthasarathi's

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property. The plaintiff's interest in the residue of Parthasarathi's estate has not been affected in any way. If the declarations for which he prays and which the Subordinate Judge has made were allowed to stand, defendant 1's just claim would be most seriously delayed and possibly defeated and the plaintiff would obtain a most unjust advantage. Such declarations would in the circumstances be obviously inequitable; and in my opinion no use of judicial discretion could justify them.

I agree that both these appeals must be allowed and the plaintiff's suit dismissed with costs in both Courts. In my opinion the plaintiff should pay the costs of both defendants 1 and 2 (2 sets) in both Courts. As I have said, the suit appears to me entirely vexatious. It is the plaintiff's next friend, his father, who is responsible for it. Instead of straightforwardly propounding Parthasarathi's will and applying for Letters of Administration under which he would have been bound to pay Parthasarathi's debts, including this debt due to defendant 1, before the plaintiff could touch the estate, he has tried to defeat a creditor by this suit on technical and vexatious grounds. In the circumstances I think the plaintiff's father also should be made personally liable for the costs of defendants 1 and 2 in both Courts. I would suggest that he alone should be made liable for the costs but for the fact that it is represented that he is a man of small means and thereby the defendants might be prevented from realising their costs in full.

K.C. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

T. R. Appaswami Aiyangar .. *Appellant** *(2nd Plaintiff)*

v.

Narayanaswami Aiyar and others .. *Respondents* *(Defendants 1 to 3 and 1st Plaintiff).*

Appaswami Aiyangar v. Narayanaswami Aiyar

Minor—Contract of sale—Fraudulent misrepresentation as to age—Innocent purchaser—Suit by ex-minor to avoid sale—Decree for possession conditional on repayment of purchase money—Contract Act, 1872, S. 65—Specific Relief Act, 1877, S. 41

Where in a suit by an ex-minor to set aside a sale effected by her during minority it was proved that she had at the time of sale deliberately made a false statement regarding her age to the defendant, who inno-

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*Appeals Nos 183 and 184 of 1925. 28th March, 1930.

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cently paid money and purchased the property, and it was further proved that the minor received the purchase money fully knowing the transaction she was entering into,

Held, that both S 65 of the Contract Act and S 41 of the Specific Relief Act were applicable to the case and a decree for recovery of the property could not be passed in favour of the plaintiff except on condition of her refunding the purchase money

Per *Reilly, J.*—To allow the ex-minor to recover the property under the circumstances without being made to give up the purchase money will be making the Court an instrument of very gross fraud which can never be allowed.

Distinction between cases where on similar facts the minor or ex-minor sues as plaintiff and cases where he is sued as defendant pointed out.

Harnath Kuar v. *Indar Bahadur Singh,* (1922) L.R. 50 I.A. 69: I.L.R. 45 All 179: 44 M.L.J. 489 (P.C.), relied on

Mohori Bibee v *Dhurmodas Ghose,* (1903) L R. 30 I.A. 114: I.L.R. 30 Cal. 539 (P.C.), explained.

Fuh Bibi v. *Khokai Mondal,* (1927) I.L.R. 55 Cal. 712, distinguished.

Mallacheruvu Raghavayya v. *Mallacheruvu Subbayya,* (1917) 7 L.W. 124, *Koduri Venkataramayya* v. *Thumuluri Punnayya,* (1925) 23 L.W. 521 and *Khan Gul* v. *Lakha Singh,* (1928) I.L.R. 9 Lah 701 (F.B.), referred to.

Appeals against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 5 of 1924.

K. Bhashyam Aiyangar, C. A. Seshagiri Sastri and *B. R. Vijiaraghavachari* for appellant in Appeal No. 183 of 1925.

M. S. Venkatarama Aiyar and *A. Narasimha Aiyar* for respondents in the said appeal.

S. Varadachariar and *M. S. Venkatarama Aiyar* for appellant in Appeal No. 184 of 1925.

K. Bhashyam Aiyangar and *C. A. Seshagiri Sastri* for respondents in the said appeal.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J.*—These appeals arise out of a suit filed by the 1st plaintiff Yamuna Raja Ammani for a declaration that the sale-deed executed by her in favour of the 1st defendant on the 13th August, 1913, whereby she conveyed the lands mentioned in the plaint to the 1st defendant for a consideration of Rs. 16,250 was obtained from her when she was a minor and that consequently the deed is invalid and confers no rights on defendants 1 to 3 for possession of the properties, for division of the properties, if necessary, and, in the alternative, if the Court should hold that the plaintiff is estopped from impeaching the sale-deed, for payment to her of Rs. 16,250, the consideration and interest thereon and for costs and other reliefs.

The facts leading to this appeal are shortly these: The plaintiff is related to the Royal family of Tanjore and Rama-

kumara Sahiba who was the Dowager Rani of Tanjore and owned certain immoveable properties made a deed of settlement whereby she gave properties to the plaintiff and to other donees by a deed, dated 10th August, 1907, which has been filed in the suit as Ex. A. Under that deed the plaintiff was entitled to a third share, another third belonged to her elder sister Rajanna Ammani and the remaining third to one Swaminatha Rao, who was the husband of another sister of hers. The 1st plaintiff was married to one Sanguram Jathav, who died in 1913. According to her she was a minor about 15 years of age at the time when this sale-deed was executed by her. She says that this sale-deed is not binding on her and that it was executed by her without receiving any consideration, that Dasarathi Sahib, her husband's brother and the 1st defendant in collusion got her to execute the sale-deed. She denies she entered into any agreement to sell the property, received any advance or got the consideration under the sale-deeds. The 1st defendant is the purchaser, 2nd and 3rd defendants are undivided sons of the 1st defendant, 4th, 5th and 6th defendants are the legal representatives of Dasarathi Sahib who died before the suit was instituted. So far as the claim against them is concerned she gave up the claim on the ground that she has compromised the matter with them. As regards the alternative claim for getting back Rs. 16,250, that was also given up in the course of the trial.

The case for the contesting 1st defendant is that the plaintiff was a major at the time of t sale, being about 19 years d, that he wanted to buy all the t e shares and did not want to take only one or two shares, that Rajanna Ammani, the elder sister of the plaintiff and Swaminatha Rao, the husband of her other sister, agreed to sell their shares, that Dasarathi and her other relations brought about the sale of plaintiff's third share, that it was represented that Yamuna also would sell the property and that she was a major, that he arranged with the vendors and also spoke to her husband and the transaction was put through with the knowledge of these people, that he was never informed that she was a minor, that an advance of Rs. 2,500 was paid under Exs. IV and V before the sale-deed was executed and the balance of Rs. 13,000 and odd which was due to the plaintiff was paid before the Sub-Registrar, that he got possession of this land and has been in possession ever since the sale. The Subordinate Judge believed the evidence of the plaintiff's witnesses and the documents filed by her to show that she was a minor at the date of the transaction. He found

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that she was born on the 12th November, 1898, and that the sale and the agreements to sell are, therefore, not binding. He, however, disbelieved her case as to the agreements, Exs. IV and V, and the advance paid under those agreements as also her case that the balance was not paid to her at the time of registration. In this view she received the money and she made the representation made before the Registrar that she was 20 years old and the defendant in ignorance of her minority actually paid the whole consideration. He was also of opinion that the price was fair and as the transaction was not in any other way open to question he held that the plaintiff was bound to repay Rs. 16,250 before she could get possession of the properties on the ground that the sale-deed was void. He passed a decree directing that on payment of this sum possession should be handed over to the plaintiff.

Although the suit was originally filed by Yamuna Bai as sole plaintiff, when the proceedings were pending in the Lower Court she assigned her rights to the 2nd plaintiff by a deed, dated 2nd August, 1923, and the 2nd plaintiff wanted to come on record as the assignee *pendente lite*. This application was dismissed by the Subordinate Judge on the ground that it was merely a traffic in litigation and it was not a *bona fide* transaction. But on appeal in C.M.A. No. 285 of 1923 the High Court held that he should be brought on record as 2nd plaintiff as the deed by assignment was there and the 1st plaintiff did not object. The 2nd plaintiff, therefore, came in after the order of the High Court on the 21st November, 1923. Against the decree of the Subordinate Judge the defendants 1 to 3 filed the Appeal No. 184 in so far as it held that the 1st plaintiff was a minor and that the sale-deed was void and possession was decreed. As against the portion of the decree which directed the plaintiff to pay into Court Rs. 16,250, the 2nd plaintiff has filed the Appeal No 183 of 1925. Both these appeals have been tried together.

The only questions in these appeals are whether the Subordinate Judge was right in coming to the conclusion that the plaintiff was a minor at the date of the sale, Ex. III, and, if so, whether he was right in passing a decree for possession on payment of the consideration which he found to have been received by the 1st plaintiff.

[His Lordship discussed the evidence relating to the age of the plaintiff and concluded:]

Having regard to all these facts, I agree in holding that the 1st plaintiff was a minor at the date of the execution of the

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sale-deed. Appeal No. 184 of 1925 must, therefore, be dismissed.

Turning to Appeal No. 183 of 1925, as I said before, the position is this: There is a sale-deed executed by a minor which is void in law. She comes to Court to set aside the sale and to get back possession of the properties. The Subordinate Judge has come to the conclusion that she did receive this money, she knew what she was doing and that although she was a minor she fraudulently gave a false age, the 1st defendant was an innocent purchaser and on these findings of fact he thought it was a case where he should make her at least pay back the money which she actually received as consideration. The first question is whether we agree with him on the facts.

[His Lordship then discussed the evidence and continued:]

On these facts, therefore, the conclusion which I have come to is that the 1st plaintiff, though a minor, deliberately made a false statement as to her age, knew the transaction that she was entering into, knew that money was actually paid by the 1st defendant and that the 1st defendant innocently paid this money and purchased the 1st plaintiff's share of the property under Ex. III.

On these facts the question is whether the Subordinate Judge was right in making the plaintiff pay back the money which she received; and in this connection we have to see what rights of the parties are. The suit itself is not a suit by 1st defendant to recover possession of the property in which case it may be said that the plaintiff was protecting the title which she had. It is a case where a fraudulent plaintiff being a minor at the time of the transaction wishes to set aside the transaction merely on the ground of minority. According to law as it now stands the contract of a minor is void and there can be no estoppel. But I can see no reason why on these facts a plaintiff who comes to the Court seeking equity being done to her may not also do equity, that is to give back what she got. Otherwise, it would enable the fraudulent plaintiff to get an advantage by getting not only the money but also the property itself. The relevant sections are section 65 of the Contract Act and section 41 of the Specific Relief Act. Section 65 of the Contract Act enacts:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

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In this case the contract is void. The 1st plaintiff comes to Court saying that she understands that the contract is void and she wants to set it aside. Section 65 of the Contract Act, in my opinion, refers to cases where a contract is *ab initio* void as in the case of a minor's contract or becomes subsequently void for some reason. Section 39 of the Specific Relief Act runs as follows:

> "Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled"

Then section 41 runs as follows:

> "On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

On section 65 of the Contract Act we have the latest pronouncement of their Lordships of the Privy Council in cases where the contract is void from its inception. In *Harnath Kunwar* v. *Indar Bahadur Singh*[1] there was a sale of *spes successionis*—the right of a reversioner—which is void under the Transfer of Property Act. The Subordinate Judge held that the vendor had merely a right of expectancy in the estate at the date of the deed and that no property passed under it. As regards the claim to recover money, he held that it is barred by limitation. Then there was an appeal which was also dismissed. The matter was taken to the Privy Council and their Lordships directed that the sale should be set aside on payment of Rs. 25,000 which was found by the Courts to have been paid by the purchaser. They also gave interest on the sum. As regards the plea that the contract being void there can be no repayment this is what their Lordships say at page 184:

> "Before this Board, the claim has been based on section 65 of the Contract Act."

Then they set out that section. They then proceed to state as follows:

> "So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English Law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (*a*) agreements, and (*b*) contracts. The distinction between them is apparent from section 2 By clause (*e*) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (*h*) an agreement enforceable by law is a contract. Section 65, therefore, deals with (*a*) agreements enforceable by law, and (*b*) with agreements not so enforceable. By clause (*g*) an

1 (1922) L.R. 50 I.A. 69: I.L.R. 45 A 179: 44 M.L.J. 489 (P.C.).

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agreement not enforceable by law is said to be void. An agreement therefore discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception, as distinct from a contract that becomes void. The agreement here was manifestly void from its inception and it was void because its subject-matter was incapable of being bound in the manner stipulated. Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the Lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of January 2, 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation. It was thus that the agreement was discovered to be void, and the discovery, in their Lordships' view, was one within the words and the meaning of section 65 of the Contract Act. The plaintiff, therefore, though not entitled to recover possession of the villages, is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum of Rs 25,000 found by both Courts to have been paid to Indar Singh and also in the circumstances of this case, interest, not at the rate or for the period claimed by the plaintiff, but at 6 per cent. from the date of the institution of this suit."

I set out the judgment in detail because the argument was sought to be founded by Mr. Bhashyam Aiyangar on the decision of their Lordships of the Privy Council in *Mohori Bibee* v. *Dhurmodas Ghose*[2]. This was a case where a minor sued to set aside a deed of mortgage and it was found that the mortgagee had notice of the minority of the plaintiff. The question arose as to whether there was an estoppel by reason of the representation of the minor and their Lordships held that section 115 of the Evidence Act did not apply where the statement acted upon is made to a person who knows the real facts and is not misled by the untrue statement. They held that a false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. Then arose the question of construction of section 65 of the Contract Act. There is an observation of their Lordships of the Privy Council that section 65 of the Contract Act being based on the footing of an agreement or contract between competent parties could not apply to a contract, by a minor which is void. Dealing with section 41 of the Specific Relief Act, their Lordships observed as follows:

"Another enactment relied upon as a reason why the mortgage money should be returned, is section 41 of the Specific Relief Act I of 1877."

Referring to section 38, their Lordships observed:

"Section 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court, but

2. (1903) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).

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the Court of first instance and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy and their Lordships see no reason for interfering with the discretion so exercised."

Pausing here for a moment it may be said that this passage shows that their Lordships were of opinion that if the mortgagee had not notice of this minority, a case would arise under section 41 for relief. Their Lordships, after dealing with the general argument that one who seeks equity must do equity, observed as follows:

"But this is the last point over again and does not require further notice except by referring to a recent decision of the Court of Appeal in *Thurstan* v. *Nottingham Permanent Benefit Building Society*[3]."

Then they cite a passage of Lord Justice Romer to the effect that a Court of Equity cannot be said to be equitable to compel a person to pay any money in respect of a transaction which, as against that person, the Legislature had declared to be void. They, therefore, refused to give relief for the return of the money. In this case, the finding accepted by their Lordships of the Privy Council was that the mortgagee had notice of the minority. But if he had no notice I do not think that this is an authority for the view that under section 41 he can get no relief.

This case has been referred to by Coutts Trotter, J., i *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[4]. was held in that case that a minor is entitled to have a sale e cuted by him during his minority set aside without repay in the absence of proof that he deliberately misled the purc into buying by a false representation that he was of age. was also held that in case of false representation section 41 o the Specific Relief Act gives the Court power to direct the refund of the consideration received by the minor before the Court grants the cancellation of the deed. Coutts Trotter, J., in referring to the case in *Nottingham Permanent Benefit Building Society* v. *Thurstan*[5] and *Mohori Bibee* v. *Dhurmodas Ghose*[2], observed thus:

"It is clear that in this country we have a statutory right to impose conditions by section 41 of the Specific Relief Act and that right is clearly recognised in *Mohori Bibee* v *Dharmodas Ghose*[2]."

Having regard to the pronouncement of their Lordships of the Privy Council in the case in *Harnath Kunwar* v. *Indar Baha-*

2 (1903) L.R. 30 I.A. 114: I.L.R. 30 C 539 (P.C.).
3. (1902) 1 Ch. 1.
4. (1917) 7 L.W. 124.
5. (1903) A.C. 6.

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dur Singh[1], already referred to, I do not think that the case in *Mohori Bibee* v. *Dhurmodas Ghose*[2] is the authority for holding that where a contract or an agreement is void from its inception, we cannot order restitution. *Harnath Kunwar* v. *Indar Bahadur Singh*[1] is a case where a transfer was void from its inception and their Lordships of the Privy Council deal with the various clauses of section 65 of the Contract Act and make the buyer get back the purchase money.

As far as English cases are concerned, the question as to whether a fraudulent minor plaintiff who induced another person to enter into a transaction and received consideration therefor is protected has been dealt with by Justice Lawrence in *Leslie, Limited* v. *Sheill*[6], where he observed as follows:—

> "There are no doubt many cases in which equity will give relief against frauds perpetrated by infants Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation Whenever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud."

Then he refers to various authorities on the subject. I have not been referred to any case where it has been held that in spite of fraudulent representation by a minor he is still ntitled to protection. All the cases in India are the other way. have already referred to *Mallacheruvu Raghavayya* v. *Malla-ruvu Subbayya*[4]. I may refer to the decision in *Koduri kataramayya* v. *Thumuluri Punnayya*[7], where *Mallacheruvu ghavayya* v. *Mallacheruvu Subbayya*[4] was followed and in at case there was misrepresentation by the minor. Reference was made to *Fuli Bibi* v. *Khokai Mondal*[8] where the question as to repayment of the money was considered. In that case the Judge expressly states that the defendant did not allege any fraudulent misrepresentation. That case, therefore, proceeded on the ground that there being no proof of fraudulent misrepresentation, there can be no equity to direct the money to be repaid. *Fuli Bibi* v. *Khokai Mondal*[8] case is, therefore, no authority for the view that even if there is fraudulent misrepresentation by a minor he can still retain both the proceeds

1. (1922) L.R. 50 I.A. 69: I.L.R. 45 A. 179: 44 M.L.J. 489 (P.C.).
2. (1903) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).
4. (1917) 7 L.W. 124.
6. (1914) 3 K B D 607 at 626
7. (1925) 23 L.W. 521.
8. (1927) I.L.R. 55 C. 712.

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as also the property which he seeks to recover. In *Khan Gul* v. *Lakha Singh*[9] the same question was decided by a Full Bench of the Lahore High Court. It was there held that ..

"A minor, who by falsely representing himself to be a major has induced a person to enter into a contract, is not estopped from pleading his minority to avoid the contract but that he may in equity be required to return the benefit he has received by making a false representation as to his age whether he be a defendant or plaintiff."

It is clear from the authorities that, if he is a plaintiff, he is bound to give back the money. In this case all the authorities are discussed in detail by the learned Judges. The Bombay High Court thinks that there is an estoppel in the case of a minor who seeks relief on a false representation and on that ground they treat the whole transaction as valid. In Calcutta, the view is taken that though there may be no estoppel, misrepresentation by a minor may give a right to restitution. See *Golam Abdin Sarkar* v. *Hem Chandra Majumdar*[10].

Having regard to the current of authorities in India which is one way at least in cases where a minor who sues as a plaintiff makes a fraudulent misrepresentation and induces an innocent person to enter into a transaction otherwise legal and validly enforceable, I am of opinion that the 1st plaintiff is bound to restore the benefit she has received. I think the Subordinate Judge was perfectly right in passing a decree for 1st plaintiff for recovery of possession of the suit properties afte[r] depositing into Court the consideration for the sale-deed (E[x.] III). In my opinion the appeal fails and is dismissed. [The] amount should be paid by the 15th of July. As each p[arty] has succeeded and failed, each party will bear his own costs [in] both the appeals.

Reilly, J.

Reilly, J.—I agree that we should not be justified in this case in differing from the learned Subordinate Judge's finding that plaintiff 1 was a minor at the date of her sale-deed, Ex. III, and that the sale is therefore void. I agree also in the findings that defendant 1 paid the full purchase-money and that plaintiff 1 represented herself to be a major in the transaction, though she must have known that that representation was false; and I also agree that it is not shown that defendant 1 knew that plaintiff 1 was a minor. On these facts it is clear that plaintiff 1 is entitled to a decree for recovery of the property. The question remains whether that decree should be

9. (1928) I.L.R. 9 Lah. 701 (F.B.).
10. (1916) 20 C.W.N. 418.

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made conditional on repayment of the purchase-money as the learned Subordinate Judge has made it.

On the face of it, section 65 of the Contract Act appears to cover the case. That section runs:

"When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

It will be seen that that section provides for two distinct classes of cases. It first provides for agreements which are discovered to be void, that is agreements which, when they were made, were supposed to be valid—which were supposed by one at least of the parties to be valid—but which are afterwards discovered to have been always unenforceable or void. The second class of cases provided for are contracts which become void, that is contracts which were quite good and valid when they were made but become void through some subsequent event. Now on the facts which we have found this is a case which falls within the first class. We have found that defendant 1 did not know that plaintiff 1 was a minor at the time of the sale-deed. So far as he was aware, it was a valid sale-deed. But it has been established and discovered in these proceedings that at the time of that deed she was a minor, and, therefore, the sale was void. On the face of it, therefore, this case comes within the first class of cases provided for by section 65 of the Contract Act.

But Mr. Bhashyam Aiyangar for the appellant here has strongly urged before us that section 65 must not be taken in its plain meaning but that, because it has been so interpreted by their Lordships of the Privy Council in *Mohori Bibee* v. *Dhurmodas Ghose*[2], it must be understood as restricted in a way not mentioned in the section—that is, the agreements and the contracts referred to in the section must be understood to be agreements and contracts made by persons competent to contract and by no others. In that case a minor had mortgaged some property. The mortgagee knew that the mortgagor was a minor. After executing the mortgage-deed and receiving the money the minor by his next friend sued for the cancellation of the mortgage-deed under section 41 of the Specific Relief Act. When that case came before the Privy Council, it was urged that section 65 of the Contract Act applied

2. (1903) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).

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to it. Their Lordships dismissed that contention very summarily. In their words

"it is sufficient to say that this section (section 65 of the Contract Act) like section 64, starts from the basis of there being an agreement or contract between competent parties and has no application to a case in which there never was, and never could have been, any contract"

Now from the facts I have mentioned it will be seen that it was not necessary for their Lordships for the purpose of that case to make a statement so wide as to apply to the whole of section 65. The first part of section 65 was clearly inapplicable to that case. There was no agreement discovered to be void by any one because on the facts found the mortgage in that case was known to be a minor's mortgage, so known to both parties, at the time the mortgage-deed was executed. So their Lordships had not to consider the first part of the section at all. What they had to consider must have been an argument that the second part of the section applied, and what they said was that it was inapplicable. That was clearly so. But the words which their Lordships used were, it must be admitted, so wide as in their grammatical sense to cover the whole section, the first part as well as the second part.

However, as has been pointed out, that section has been considered by the Privy Council again in a later case, *Harnath Kunwar* v. *Indar Bahadur Singh*[1]. That was a suit brought by a purchaser for possession of an estate sold by a Hindu widow' reversioner before the reversion fell in or for the return of t purchase-money. It was found that the sale was void; bu was also found that through misapprehension the parties not know that at the time of the sale but discovered it af wards. In that case the Privy Council decided that the vend must give compensation to the purchaser. They directed that he must pay the purchase-money with interest. They arrived at that result by applying section 65 of the Contract Act to the case. There it will be seen the sale was void from its inception, but it was only discovered to be so subsequently. That was clearly a case to which the first part of section 65 of the Contract Act applied. But it will be noticed; in the words of their Lordships of the Privy Council in *Mohori Bibee* v. *Dhurmodas Ghose*[2], that was also clearly a case where there never was, and never could have been, a contract; and yet in spite of those words in *Mohori Bibee* v. *Dhurmodas Ghose*[2] their Lordships said that section 65 of the Contract Act was

1 (1922) L.R. 50 I.A. 69: I.L.R. 45 A. 179: 44 M.L.J. 489 (P.C.).
2. (1903) L.R. 30 I.A. 114· I.L.R. 30 C. 539 (P.C.).

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applicable. I think that clearly shows that in *Mohori Bibee* v. *Dhurmodas Ghose*[2] their Lordships' remarks were confined to the second part of section 65. That was the only part which I gather the appellant asked should be applied in that case. If we understand the remarks of their Lordships in *Mohori Bibee* v. *Dhurmodas Ghose*[2] otherwise, there is an obvious contradiction between the two cases; and in disposing of the later case their Lordships do not appear to have had any idea that they were saying anything contradictory to what had been said in the earlier case. In my opinion it is clear that in no part of what they said in *Mohori Bibee* v. *Dhurmodas Ghose*[2] were their Lordships considering the first part of section 65 of the Contract Act. They were not in that case laying down what would have been a very surprising doctrine, and certainly unnecessary for the case before them, that agreements discovered to be void under section 65 meant only agreements made by persons competent to contract. In fact, their words, "the section has no application to a case in which there never was, and never could have been, any contract," would, if I may say so with respect, not be an interpretation of the first part of section 65 of the Contract Act but in direct conflict with it. So when we examine those two cases, I think it is clear that section 65 of the Contract Act is applicable to a case like this and as been applied by their Lordships to a similar case in *Harnath unwar* v. *Indar Bahadur Singh*[1]. On that basis it is clear plaintiff 1 in this case, if she is to get back the property, repay the purchase-money.

But quite apart from that, we have section 41 of the ecific Relief Act. In *Mohori Bibee* v. *Dhurmodas Ghose*[2] e Privy Council indicated that that section was applicable to the minor in that suit, who there sued for cancellation of the mortgage-deed. They said that the Lower Courts had discretion to make relief conditional on compensation under section 41 of the Specific Relief Act in that case, though as a matter of fact the Courts did not make such an order. In this case plaintiff 1 has prayed that her sale-deed Ex. III might be declared void and for recovery of possession of the property. Section 41 of the Specific Relief Act appears to me to be applicable to such a case. That that section can be applied in such a case was decided in *Mallacheruvu Raghavayya* v. *Mallacheruvu Sub-*

1. (1922) L.R. 50 I.A. 69: I.L.R. 45 A. 179: 44 M.L.J. 489 (P.C.).
2. (1903) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).

bayya[4], which I myself followed in *Koduri Venkataramayya* v. *Thumuluri Punnayya*[7] and it was also decided in *Lila Dhar* v. *Piarey Lal*[11]. In *Khan Gul* v. *Lakha Singh*[9] a purchaser sued a minor vendor, who had misrepresented his age, for possession of the property sold or for return of the purchase-money. A Full Bench of the Lahore High Court were of the opinion that in such circumstances the minor must return the benefit received, whether he was a plaintiff or defendant. Mr. Bhashyam Aiyangar has suggested that in this case section 41 of the Specific Relief Act cannot be applied because plaintiff 1 need not have included any prayer for a declaration that her sale-deed was void in the plaint. As he puts it, she could have ignored the sale-deed and could have brought the suit solely for recovery of possession: in that way section 41 might have been avoided. But I do not think that manœuvre would really alter the position. If plaintiff 1 had simply brought her suit for possession, defendant 1 would have met her with her sale-deed. Then the Court would have had to consider the very same question, whether that was a valid sale-deed, whether it was a sale-deed which the Court should declare void, as has been declared here, and, when the Court considered the matter in that way, it would have been proper to apply the principles of section 41 of the Specific Relief Act.

Mr. Bhashyam Aiyangar referred to *Thurstan* v. *Nottin-ham Permanent Benefit Building Society*[3] [on appeal *Nottingh Permanent Benefit Building Society* v. *Thurstan*[5]], a case w was decided by the Court of Appeal, the decision being con by the House of Lords. That was an interesting case in wh minor, Mrs. Thurstan, had mortgaged some land. She made no misrepresentation about her age; but the mortga society had supposed that she was a major. On attaining majority the ex-minor sued to set the mortgage aside and to recover possession of the property. The Court of Appeal found that she was entitled to succeed without repaying the mortgage-money. Romer, L.J., in that case said:

> "A Court of Equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which, as against that person, the Legislature has declared to be void."

Now, so far as that goes, it appears to be of assistance to plaintiff 1. As I understand it Romer, L.J., was stating a limitation, a qualification, to the general rule that he who seeks

3. (1902) 1 Ch. 1.
4. (1917) 7 L.W. 124.
5. (1903) A.C. 6.
7. (1925) 23 L.W. 521.
9. (1928) I.L.R. 9 Lah. 701 (F.B.).
11. (1921) 19 A.L.J. 578.

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equity must do equity. But we must remember that does not affect the statutory provisions of section 41 of the Specific Relief Act in this country. In *Mohori Bibee* v. *Dhurmodas Ghose*[2] the Privy Council draws that distinction I think very clearly. They quote Romer, L.J.'s remark and say that it was applicable to that case and that the general rule that he who seeks equity must do equity did not apply in that case. But they had already said that section 41 of the Specific Relief Act did apply. So it is clear that, although the general principle of equity may be limited in that particular way, that limitation has no effect on the principle of section 41 of the Specific Relief Act, by which we have to be guided in this country. I may mention also that Romer, L.J., in that case also said that different considerations would arise if the infant had been guilty of fraud. In this case we have the fact that plaintiff 1 was guilty of fraudulent misrepresentation of her age.

Mr. Bhashyam Aiyangar also referred to *Leslie, Limited* v. *Sheill*[6]. There the plaintiff had lent money to the defendant, a minor, who had represented himself to be a major. The lender sued for relief against the minor. But the defendant's plea of infancy was found good, and it was held that the defendant was under no legal or equitable liability at all to the plaintiff. It will be seen that the plaintiff n that case could not sue upon his contract. That as admitted. The question was whether he could get any ef in law or equity against the defendant. The answer of Court was that no decree could be made against the minor -minor at all in that matter. But that appears to me to e no application to this case, where an ex-minor is suing or relief. There is, however, an interesting passage in that case, which has already been quoted, in the judgment of Lawrence, J., who was sitting in the Court of Appeal on that occasion. He said:

> "Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud, he will be made to restore it to its former owner."

The first of these sentences expresses a principle which we have to remember in this case. Mr. Bhashyam Aiyangar drew our attention to the succeeding sentence:

> "But I think that it is incorrect to say that he can be made to repay

2 (1903) L.R. 30 I.A. 114 I.L.R. 30 C. 539 (P.C.).

6 (1914) 3 K.B.D. 607.

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money which he has spent, merely because he received it under a contract induced by his fraud.''

Mr. Bhashyam Aiyangar contended that the learned Judge meant that restitution might be required in the shape of property or perhaps in the shape of a fund which could be traced, but that no order for repayment of money could be made. I think that is to misunderstand the learned Judge's statement. What he was referring to in the last sentence quoted, I think, was the impossibility of making a decree against the minor for repayment, a decree which could be executed against him. Where the minor or ex-minor is the plaintiff there is no reason why restitution should not be in money as well as in kind. The contrast between ordering restitution when the minor or ex-minor is the plaintiff and making an executable decree for repayment against him as defendant is not a question of coin or money. The contrast is between making a decree against him for repayment of money and making an order in his favour conditional on restitution in money or otherwise. There is a very important difference between enforcing in any way, direct or indirect, a minor's void agreement and giving a minor conditional relief when he applies for relief in respect of a void agreement.

And, I think, we must remember that apart from the special provisions of law, to which I have referred, there is a genera principle that we must never allow the Court to be made by plaintiff an instrument of fraud. That applies just as muc a minor plaintiff as to any other plaintiff. We have no to be tender to a minor in that matter. If a minor were a ed to misrepresent his age to a purchaser, to sell propert the purchaser so deceived, to deliver the property to him, t collect the purchase-money and then to come to Court at once and recover the property without being made to give up the purchase-money, that would be making the Court an instrument of very gross fraud, which we could never tolerate. In my opinion, under the provisions of section 65 of the Contract Act, under the provisions of section 41 of the Specific Relief Act and on the general principle which I have mentioned we cannot make the decree to which the plaintiffs are entitled for the recovery of the property except on condition that they refund the purchase-money.

I agree that both these appeals should be dismissed without costs.

B.V.V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

In the matter of the Guardians and Wards Act (VIII of 1890)

and

In the matter of the property of the minors Lakshmi Bi and others.

Ghulam Mohideen Sahib .. *Applicant**

v.

Md. Oomer Sahib and another .. *Respondents.*

K. A. Dawood Saheb, Plaintiff-decree-holder in C.S. No. 76 of 1925 on the file of the High Court, Madras .. *Attaching Creditor.*

Ghulam Mohideen Sahib *v.* Md. Oomer Sahib.

Practice—Solicitor's lien—Madras High Court, Original Side—Order for costs in favour of party—Right of Attorney to recover taxed bill of costs—Limitation—Subsequent attachment of order for costs by third party—Effect—Question of notice whether material

In an Original Petition filed in the High Court on its Original Side an order for costs was made in favour of a party. About six years later, the Attorney for the party filed his bill of costs at his client's request and the same was taxed by the Registrar Subsequently, the order for costs was attached by a third party in execution of a decree obtained against the Attorney's client. A question relating to Solicitor's lien having been raised,

Held, that assuming Art 84 of the Limitation Act applied by analogy to applications, the Attorney's claim was not barred on the date, when he filed his bill of costs.

Held, further, that the Attorney's claim could not be defeated by the third party's attachment of the order for costs. In such cases the question whether the attaching creditor had express notice of the Attorney's lien is immaterial The fact of there being a fund in Court amounts to notice of the existence of a solicitor's lien.

Tyabji Dayabhai & Co v. Jetha Devji & Co., (1927) I.L.R. 51 Bom 855, followed

N. Rajagopalan for *P. V. Sudarsana Raju* for applicant.

W. V. Rangaswami Aiyangar for attaching creditor.

The Court delivered the following

JUDGMENT.—This summons raises a question relating to a Solicitor's lien. In O.P. No. 44 of 1923 costs were awarded to Ghulam Mohideen against Govindarajulu by an order, dated the 17th of December, 1924. Mr. Sudarsana Raju, as attorney, appeared then for Ghulam Mohideen. Nothing seems to have been done for about six years. Then in April, 1930, at his client's request, the Attorney filed his bill of costs which was taxed by the Registrar on the 28th of April, 1930. In doing so, the Registrar overruled the objection of Rajabahadur, the legal

*Application No. 2173 of 1930 (O.P No 44 of 1923) 2nd October, 1930.

representative of Govindarajulu, who, in the meantime, had died. In execution of the order for costs against Rajabahadur, certain jewels were seized and brought into Court. This happened on the 7th of August, 1930.

I must now turn to a suit filed by Dawood Saheb against Ghulam Mohideen, C.S. No. 76 of 1925. In that suit, on the 26th of July, 1925, Dawood obtained a decree against Ghulam Mohideen. In execution of that decree, he applied on the 2nd of August, 1930, for attachment of the order for costs in O.P. No. 44 of 1923, which had been obtained by his judgment-debtor, namely, Ghulam Mohideen. I am satisfied that it was with the active help of Rajabahadur that Dawood Saheb took this step. But this is really immaterial, for in my judgment nothing turns upon it. Mr. Sudarsana Raju intervened and objected that costs were due to himself from his client and that the attachment asked for by Dawood Saheb should not be made, as it would defeat his own right The Master must be taken to have overruled the objection of the Attorney, for, on the 15th August, 1930, he made an order for attachment in favour of Dawood Saheb. Mr. Sudarsana Raju urges that he has a Solicitor's lien for his costs and on that ground attacks the Master's order.

The first ground taken by the Counsel for Dawood Saheb is, that the Attorney has no subsisting claim for costs against his own client. The facts bearing on this point are these. Th Attorney's account books show that in 1924 he received fr his client Rs. 10 and spent on his behalf Rs. 6. From 19 to 1930, as I have said, nothing seems to have been done; b in April, 1930, Ghulam Mohideen requested Mr. Sudarsana Raju to tax his bill of costs. The latter seems to have incurred expenses by way of out-fees amounting to Rs. 40. The total amount thus spent by him comes to Rs. 46; and deducting from it Rs. 10 to which I have already referred, he was out of pocket by Rs. 36 The costs allowed to him on taxation amounted to Rs. 500 and odd What is urged by Dawood's Counsel is, that the business for which the Attorney was employed terminated on the 17th of December, 1924, and that the Attorney's claim for costs against his client was therefore barred under Art. 84 of the Limitation Act. Art. 84 is restricted to suits, but I shall assume that even applications are governed by it by way of analogy. That article provides a period of three years for a suit by an Attorney "for his costs of a suit or a particular business," the time running from "the termination

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of the suit or business". It cannot be said that the business terminated in 1924. There is no question in this case between the Attorney and his client. When his own client treats the engagement as subsisting and instructs him to tax his bill of costs, how can it be said that the business has terminated? Would it be open, for instance, to Ghulam Mohideen, if a suit had been brought against him by Sudarsana Raju, to plead that the latter's claim for costs was barred, notwithstanding what had happened between him and his Attorney in April, 1930? The answer must plainly be in the negative. I therefore hold that on the date when Sudarsana Raju intervened and objected, he had a subsisting claim for costs which he could have enforced against his client in a regular suit.

This brings me to the second point raised, namely, has the Attorney a lien for his costs, which cannot be defeated by a third party's attachment? This point is fully considered by Sir Amberson Marten, C.J., and Mr. Justice Blackwell in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.*[1] The learned Chief Justice reviews the English cases at length and points out that a Solicitor has under the common law what is known as *particular lien*, which does not depend on actual possession of the property, as distinguished from *possessory lien* by reason of certain property like title-deeds being in his hands. The English cases also show very clearly that this common law lien has not een abrogated by statute. This is pointed out by Mr. Justice rwell in In re *Born*[2], where he observes that a solicitor has a mmon law lien on the fruits of a judgment recovered by his ertions, for it would be inequitable to give the client the benefit of the Solicitor's labour without paying for it. To the same effect are the observations of Mr. Justice Swinfen Eady in In re *Meter Cabs, Ltd.*[3] and of Lord Justice Cotton and Lord Justice Lindley in *Guy* v. *Churchill*[4]. In the judgment of the Bombay High Court these and several other cases have been fully referred to and I shall not, therefore, discuss the point at any further length. That the law in India on this point is in conformity with the Common Law of England is also established by the same decision. In a case quoted by the learned Chief Justice Sir Charles Sargent says:

"It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts

1. (1927) I.L.R. 51 B. 855
2. (1900) 2 Ch. 433.
3. (1911) 2 Ch. 557.
4. (1887) 35 Ch. D. 489.

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before the passing of 23 and 24 Vic, cap 127, (the Solicitors' Act, 1860), by which that lien was very much extended By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit" (*Devakabai* v. *Jefferson*[5])

It is also clear from the decided cases that the Attorney's lien is not liable to be defeated on the ground that the assignee of a decree or the attaching creditor of the Solicitor's client had no express notice of the lien. The fact of there being a fund in Court amounts to notice of the existence of a Solicitor's lien. The same rule is stated differently thus: If the assignee has notice that what is assigned is the subject-matter of a suit, he must be deemed to have notice of the existence of the solicitor's lien. (*See* the cases cited in the Bombay High Court judgment.) In the present case, the Attorney pointed out that he had a lien before the attachment was made. But, as I have said, the question whether the attaching creditor has express notice is immaterial.

Then remains the question, what is the order I am to make? Dawood Saheb after obtaining the attachment has realised the sum from Rajabahadur; at any rate he says so, and what is material is, that on the 22nd August, 1930, he entered up satisfaction of the order for costs. I must, therefore, direct Dawood Saheb to bring back, by way of restitution, Rs. 464-8-0 to be paid over to Mr. Sudarsana Raju. When the amount is brought back, the part satisfaction which Dawood entered of his own decree in C.S. No. 76 of 1925 will stan revoked.

It follows from this that the jewels in Court must be turned to Rajabahadur and I make an order accordingly.

In view of the fact that Mr. Sudarsana Raju slept over his rights for about six years, I make no order as to costs.

B.V.V. *Master's Order modified.*

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5. (1886) I.L.R. 10 B. 248.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE BARDSWELL.

Narasimha Raghavachari .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council (through the Collector of North Arcot) .. *Respondent* (*Defendant*).

Narasimha Raghavachari v. The Secretary of State for India in Council.

Mirasi tenure—Incidents of—Burden of proof—Right of mirasidar to village waste.

Mirasi tenure with hereditary rights has become practically extinct in the Madras Presidency except in the Districts of Chingleput and Tanjore. And where it obtains, the nature and extent of the rights vary from place to place. The right of a mirasidar to cultivable land is only a preferential one, his right to arable waste is again a matter of evidence. The tenure does not, as such, carry with it any of the privileges commonly associated with it as originally understood; it is on the mirasidar to prove affirmatively any specified incident or right, as attached to the tenure, if he claims such a right.

Seshachala Chetty v. *Chinnaswami*, (1916) I.L.R. 40 Mad. 410: 32 M.L.J. (Sup.) 1 (F.B.), referred to.

It cannot, therefore, be assumed, simply because the plaintiff is styled ekabhogam mirasidar and has hitherto been the sole pattadar in a village close to the Chingleput border, that he is entitled to any preferential rights over the village waste or to interdict an assignment of the waste land by the Government in favour of strangers.

Appeal against the decree of the District Court of North Arcot at Vellore, dated 21st February, 1927 and made in O.S. 7 of 1926.

T. Rangachariar, A. C. Sampath Aiyangar and *T. R. Srini-* *Aiyar* for appellant.

The Government Pleader for respondent.

The judgment of the Court was delivered by

Bardswell, J.

Bardswell, J.—This appeal is by the plaintiff. He is Monegar of a village in the North Arcot District within about three miles of the Chingleput District border. He claims to be ekabhoga mirasidar of the suit village, Melwarma. The word "ekabhogam," according to the Glossary in the North Arcot District Manual of 1895, means the possession or tenure of all the lands of a village by a single individual or family without any co-sharer. Survey No. 128-1, the extent of which is 66·83 acres, has been assigned by the Revenue Divisional Officer of Cheyyar to some Adi Dravidas of a neighbouring village and the plaintiff says that the grant is in violation of his right to the said land as, in his capacity as ekabhoga

*Appeal No. 184 of 1927. 28th August, 1930.

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mirasidar, he and his ancestors before him have been in exclusive possession of all the village lands, including waste, poramboke and communal lands. Even if the Government reclaims any waste land for the purposes of cultivation and in the interests of revenue it has no right to assign it to strangers but the plaintiff as ekabhoga mirasidar has a preferential right to an assignment in his favour. He has, therefore, sued for a declaration that the order of the Revenue Divisional Officer of Cheyyar of 3rd June, 1924, assigning the suit land to some Adi Dravidas, is illegal, *ultra vires* and not binding on him. His suit has been dismissed and so he is appealing.

In his evidence the plaintiff as P.W. 1 defines his mirasi rights as meaning that he alone is to be pattadar of all assessed lands in the village, that no land is to be assigned to anyone else, and that he is entitled to the assignment of trees and to the rocks in the village. There is no doubt but that mirasi rights such as those to which the plaintiff lays claim used to be enjoyed to a considerable extent throughout the Presidency, but, as has been pointed out in *Seshachala Chetty* v. *Chinnaswami*,[1] those rights gradually got lost, though they survived in the Districts of Chingleput and Tanjore. They also survived in the North Arcot District which is the district with which we are now concerned, as is shown by the North Arcot District Manual of 1881, in which a reference is made to a mirasi righ to the hereditary possession of cultivable lands, as well as the gradual transfer in some instances of all the shares of several mirasidars to one individual, in which case the v that came into the possession of a single person was sty ekabhogam; and it is remarked that instances of such of tenure are still to be found in those parts of the Dis which border on Chingleput. But a little later on the same District Manual refers to a report by a Collector of the District, soon after the cession of the Carnatic, that the mirasi system had no existence in North Arcot. There is a less ambiguous statement of the position in the revised District Manual of 1895, from which the remark as to there still being instances of the mirasi tenure to be found in the North Arcot District is omitted.

Further it is to be observed that both these editions of the District Manual say that the hereditary mirasi rights over cultivable land belonged only to the Vellalas, whereas the plaintiff in the present case is a Brahmin. It is, indeed, stated that

1. (1916) I.L.R. 40 M. 410: 32 M.L.J. (Sup.) 1 (F.B.)

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mirasi privileges, which were termed Swastiams, were enjoyed by Brahmins, but even the earlier edition of the District Manual does not refer to any such privileges as still continuing. The claim, then, of the plaintiff is not one that starts with the initial advantage of being rendered probable, in the light of what has been shown to be the practice, by any recognised authority upon the state of affairs in the District of North Arcot.

There is no doubt as to the continuance of some such mirasi privileges as are claimed by the plaintiff in the Chingleput District. What is the nature and extent of such privileges has been discussed in *Seshachala Chetty* v. *Chinnaswami*[1]. The learned Judge who has decided the suit under appeal thinks that, considering that the suit village is within a short distance of Chingleput border, it is not unreasonable for plaintiff to claim that his village is a mirasi village after the Chingleput pattern. He points out that the village is not an ordinary ryotwari village, in that no pattadar other than the plaintiff is to be found in it, and he thinks, therefore, that the plaintiff is entitled to rely on his position as involving the existence of some right greater than that of the ordinary ryot. The learned Judge has then proceeded to consider what such right may be with reference to *Seshachala Chetty* v. *Chinnaswami*[1] and has come to the conclusion that in the light of that case the plaintiff has not on the facts established his right to such a decree s that for which he has sued. We are of opinion that in so aling with the case the learned Judge has not looked at it m the right angle. It cannot be presumed merely from the raphical position of his village and from the fact that he is, s been hitherto, the only pattadar in it that the plaintiff ust be a mirasidar after the pattadar of the mirasidars of Chingleput. It is not even as if there was any evidence to show that the suit village had at one time belonged to Chingleput District and had been transferred to the District of North Arcot. Even, too, in *Seshachala Chetty* v. *Chinnaswami*[1] it has been held by Kumaraswami Sastri, J., that, though in mirasi villages the rights of Government over waste are subject to the rights of the mirasidars, yet the nature and extent of such rights are not uniform throughout the Presidency, but vary, and that the *onus* is on the mirasidars to prove that any specified incident attaches to mirasi rights in any particular District or portion thereof; and Sadasiva Aiyar, J., in his order of reference in the same case, has pointed out that from the decision in *Sakkaji*

1. (1916) I.L.R. 40 M 410: 32 M.L.J. (Sup) 1 (F.B.)

Narasimha Raghavachari v. The Secretary of State for India in Council.

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Rau v. *Latchmana Gaundan*,[1] it is clear that the extent of the mirasi right in one village was not the same as that of the mirasi right in another village even in the same District. It is, therefore, absolutely incumbent on the plaintiff to prove what rights, if any, he possesses as ekabhogam mirasidar and we cannot start with the assumption that, because he is styled ekabhogam mirasidar as is shown to be the case, and has been hitherto the sole pattadar in a village that lies close to the Chingleput border, he must have certain privileges and then proceed to see what those privileges are, with reference not to any evidence on record but only to opinions expressed as to those privileges in *Seshachala Chetty* v. *Chinnaswami*[2] or any other reported decisions.

Proof that the plaintiff has the privileges which he claims is entirely wanting. He says that he had a sanad which was filed in some proceedings in 1880, but he does not explain why this sanad, or a copy of it, could not be put in. He merely says that he never got it back. None of his witnesses shows, nor even attempts to show, that only he has the right to patta for all the cultivable land in the village. On the other hand he himself has admitted that his cultivation of the suit land has been treated as unauthorised, apparently without his making any protest. The witness who is most favourable to him is the karnam, D.W. 2, who has described him as ekabhogam mirasi-dar in official documents, who would call him hereditary mira dar of the village and who says that "Mirasidar" means ow of the village. This witness, however, does not say what ri attach to the position of an ekabhogam mirasidar, while mere fact that the plaintiff is so described goes for very Proof is needed that the description still has the same si ficance that originally attached to it, and has not become a mere expression like the title of a sinecure holder. Such proof is entirely lacking. There is, of course, the fact that he has been hitherto the sole pattadar in the suit village; but it is for him to show that this is by virtue of some right which he possesses, and this he has not done. The existence of such a right in him cannot be merely inferred. As to the meaning of "owner" which D.W. 2 gives to the word "mirasi," it is one that can only be accepted with qualification. The Glossary in the North Arcot District Manual of 1895 explains mirasi tenure as that under which the lands of a village are divided

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1. (1916) I.L.R. 40 M 410: 32 M.L.J. (Sup) 1 (F.B.).
2. (1880) I.L.R. 2 M. 149 (F.B.).

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among certain families who are called mirasidars, while *Seshachala Chetty* v. *Chinnaswami*[1] indicates that the right of a mirasidar to cultivable land in a village was not an absolute but a preferential one, and Wallis, C.J., has remarked in his judgment in this case that even as regards cultivable waste the mirasidar's ownership has not been fully established.

In the same case it has been remarked by Ayling, J., that he could find no authority in support of any right of recovery by the mirasidars of arable waste granted by Government to another person. It is, of course, at such a recovery that the plaintiff is aiming in this suit. The same opinion has been more strongly expressed by Turner, C.J., in *Subbaraya Mudali* v. *The Sub-Collector of Chinglepnt*[3], when he says that a Civil Court cannot compel the Revenue authorities to make settlement with a particular person, and that in the matter the discretion of the Revenue authorities is uncontrolled. This view has been referred to with approval in *Theivu Pandithan* v. *Secretary of State for India*[4].

We may note that the decision in *Seshachala Chetty* v. *Chinnaswami*,[1] to which many references have been made in this judgment and which has been called a great deal to our attention on the hearing of this appeal, is one as to whether or no, in a mirasi village, a mirasidar was to be presumed to be the owner of the gramanatham. The decision was adverse to the mirasi claims of presumptive ownership and that is all that the case decides, all that is said as to the general rights of a mirasidar being by way of discussion. None the less we should have to treat the opinions of the various learned Judges who dealt with the case with considerable respect could the plaintiff show that his case was a case to which they applied. This, however, he has failed to do, while even that decision itself, in the judgment of Kumaraswami Sastri, J., is an authority showing that the plaintiff must establish the rights to which he lays claim by evidence.

As he has entirely failed to achieve this, his suit has been rightly dismissed. The appeal fails and is dismissed with costs.

S.R. *Appeal dismissed.*

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1 (1916) I.L.R. 40 M. 410 · 32 M.L.J. (Sup) 1 (F.B.)
3 (1883) I.L R. 6 M. 303
4. (1898) I.L.R. 21 M. 433 (F.B.)

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

The Secretary, Cantonment Committee, Barrackpore, on behalf of the Secretary of State for India in Council .. *Appellant**

v.

Satish Chandra Sen .. *Respondent.*

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The Secretary Cantonment Committee, Barrackpore *v.* Satish Chandra Sen.

Land Acquisition Act (I of 1894)—Lands in Cantonment—Burden of proof—Cantonment tenure—Nature and origin of—Mouzawari Register, entry in—Evidence Act, S. 35—Recitals in deeds—Admissibility in evidence—What passes at an execution sale.

When the Government are acquiring immoveable property for a public purpose under the Land Acquisition Act, it is for the person claiming compensation for such property to establish his title to it affirmatively.

In a dispute, under the Land Acquisition Act, 1894, concerning the ownership of certain land situate in the Barrackpore Cantonment,

Held, that though it could not be laid down as a general proposition that all land in the Cantonment was necessarily the property of Government, the particular plot in question was, having regard to the Bengal Regulation of 12th September, 1836, and other materials on the record, the property of the Government, and the claimant had failed to discharge the *onus* that lay upon him of proving that it was his private property.

Robinson v. *Carey*, Coryton's Report, p. 137 (*per* Norman, J.), referred to.

Ghaswala v. *The Secretary of State*, (1911) L.R. 38 I.A. 204: I.L.R. 36 B. 1. 21 M.L.J. 1100 (P.C.), relied on.

An entry in the Mouzawari Register recording certain property as Mehal "Khas Sircar" (*i.e.*, in the possession of Government) is admissible in evidence under S. 35, Evidence Act, but such an entry *per se* is not sufficient to establish the title of Government to the property.

Semble: Recitals in a deed are not evidence as against a person who was not a party or privy to the deed.

Banga Chandra Dhur Biswas v. *Jagat Kishore Chowdhuri*, (1916) L.R. 43 I.A. 249 at 254; I.L.R. 44 C. 186: 31 M.L.J. 563 (P.C.), referred to.

A sale certificate in execution passes nothing but the right, title and interest of the judgment-debtor, whatever it may have been.

Tenure of property in cantonments discussed.

Judgment of the High Court, Calcutta, reversed.

Appeal No. 80 of 1929 from a decree of the High Court, Calcutta, dated the 20th June, 1927, which affirmed a decree of the Special Land Acquisition Judge of the 24-Parganas, dated the 9th July, 1925, and awarded compensation for land in the Cantonment of Barrackpore to the respondent.

The material facts of the case are sufficiently fully stated in their Lordships' judgment.

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*P.C. Appeal No. 80 of 1929. 14th October, 1930.
Bengal Appeal No. 4 of 1928.

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The Secretary Cantonment Committee, Barrackpore v. Satish Chandra Sen.

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Dunne, K. C. and *Wallach* for appellant.

Upjohn, K.C. and *Dube* for respondent.

14th October, 1930. Their Lordships' judgment was delivered by

Sir George Lowndes.—This appeal arises out of certain land acquisition proceedings. The Government notified for acquisition a plot comprising some 5¼ *bighas* of land with a house upon it situated in the Barrackpore Cantonment. The respondent was in possession under a title which will be presently considered. The Collector valued the buildings at Rs. 11,467-11-0 which together with Rs. 1,720-2-5, the statutory addition of 15 per cent. for compulsory acquisition, he awarded to the respondent and this part of his award is not in dispute. He valued the land at Rs. 9,510-10-0, but refused to award any part of this to the respondent on the ground that the land being Cantonment land was the property of Government. The respondent claimed a reference in the ordinary course. The case came before the Special Land Acquisition Judge, who held that the respondent was entitled to the value of the land also, and accordingly passed a decree in his favour for the additional sum of Rs. 10,937-3-6, being the above-mentioned sum of Rs. 9,510-10-0 together with the additional 15 per cent. The Secretary of State appealed to the High Court, but his appeal was dismissed, and the matter now comes before His Majesty in Council upon the High Court's certificate.

The question seems to have been dealt with in India as if the matter were one of apportionment between two contending claimants, the sole criterion being which of the two had made out the better claim to a particular part of the compensation. Their Lordships, however, have no doubt that when Government are acquiring immovable property for a public purpose under Act I of 1894, it is for the person claiming compensation to establish his title to it affirmatively.

The difficulty in the present case arises mainly from the fact that the acquired property is admittedly within the Barrackpore Cantonment, and the tenure of such property is in many cases of a somewhat anomalous character. It seems clear that much at all events of the land comprised in this cantonment, and probably in other cantonments in different parts of India, was originally acquired by Government for military purposes, but that private individuals were allowed to erect houses upon various plots. Government appear to have encouraged this form of development as providing a simple solution of the

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varying demand for officers' quarters, and to have recognised, subject to certain restrictions, rights of private ownership in the buildings, while at the same time retaining in themselves the property in the soil. This is sometimes referred to as "military or cantonment tenure."

There have been from very early times in Bengal rules promulgated by Government for the control of buildings in cantonments, and on the 12th September, 1836, in supersession of previous orders, a "Regulation" of the Governor-General in Council was notified dealing primarily at all events, as their Lordships think, with applications to build upon unoccupied land in cantonments. Clause 6 of this Regulation is in the following terms:—

"6 No ground will be granted except on the following conditions, which are to be subscribed to by every grantee, as well as by those to whom his grant may subsequently be transferred.

First—The Government to retain the power of resumption at any time, on giving one month's notice, and paying the value of such buildings as may have been authorised to be erected

Second—The ground being in every case the property of Government cannot be sold by the grantee; but houses or other property thereon situated may be transferred by one Military or Medical Officer to another, without restriction, except in the case of reliefs, when, if required, the terms of sale or transfer are to be adjusted by a Committee of Arbitration

Third—If the ground has been built upon, the buildings are not to be disposed of to any person, of whatever description, who does not belong to the Army, until the consent of the Officer Commanding the station shall have been previously obtained under his hand

Fourth—When it is proposed, with the consent of the Commanding Officer, to transfer possession to a native, should the value of the house buildings or property to be so transferred exceed 5,000 Rupees, the sale must not be effected until the sanction of Government shall have been obtained through His Excellency the Commander-in-Chief."

It is contended for the appellant that these rules, and in particular the 2nd paragraph of clause 6, declare all lands in cantonments to be the property of Government. Their Lordships are not satisfied that this is the necessary implication, though the rules certainly suggest that some, and probably the greater part, of the land was at that time Government property.

In 1840 a question as to house property in this cantonment came up for decision by the Supreme Court at Calcutta. Part of the estate in an administration suit consisted of cantonment houses, and their devolution seems to have depended upon the question whether they were realty or personalty. The Master to whom this question was referred found and reported that "the whole land within the limits of the Cantonment at

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Barrackpore is the property of the East India Company," and that "all private houses built thereon and all parts of such land as are appropriated to private purposes are built and appropriated on leave given by Government," and he accordingly found that the property in question was personalty. His finding was accepted by the Court and was embodied in its decree, a certified copy of which forms part of the record in this appeal. The conclusion come to seems to have been based in part, at all events, upon the rules of 1836, and though upon the materials now available their Lordships are not prepared to affirm that all land in the cantonment is necessarily the property of Government, the decision suggests that in 1840, when these rules had only recently come into operation, there was no common knowledge of the existence of any privately owned land in the cantonment.

For the respondent it is contended that under these rules a register and plan were to be kept upon which all grants by Government were to be entered, and reliance is placed upon the fact that no such records are produced. Their Lordships are driven to the conclusion that these provisions have been disregarded by the military authorities, but in the absence of any proof that the respondent's buildings were erected after 1836, they think that no presumption can be drawn in his favour from this apparent dereliction of duty.

Reference has also been made to the more recent Cantonment Acts and rules which have gradually developed into a regular code of municipal law, and it is pointed out by the respondent that many of the provisions evidently contemplate the existence of privately owned property within cantonment limits.

Turning now to what is known about the Barrackpore Cantonment in particular, a number of official letters have been produced, commencing with one from Warren Hastings, dated the 2nd February, 1775, which make it clear that between that date and 1814 Government acquired a considerable quantity of land for the cantonment, and a survey map has been put in evidence dated in 1851, which shows the cantonment as consisting of 889 acres, 1 rood, 31 poles. It is on a small scale, but in great detail and shows the plot the subject of this appeal with buildings upon it which are no doubt those of which the value has been awarded to the respondent by the Collector. An entry has also been produced from the *Mousawari* Register, dated the 30th September, 1853, in which the Barrackpore Cantonment with the same area as above is entered as a *Mehal*

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"Khas Sircar" which seems to mean in the possession of Government. Counsel for the respondent has objected to the admissibility of this entry, but there is no trace of any objection having been taken to it in the Courts in India, and their Lordships think that it is admissible, for what it is worth, under section 35 of the Indian Evidence Act.

Their Lordships hold that the fair inference from these facts, taken in connection with the rules of 1836, is that much, and possibly most, of the land in this cantonment was and is the property of Government; that houses were erected upon it by the licence of Government, the buildings being recognised as the property of the persons by whom they were erected, and the land remaining in the ownership of Government, but that there may nevertheless have been within the cantonment limits some land which was never acquired by Government, and of which the ownership was always in private hands.

If it lay upon the appellant to prove the acquisition of the particular plot which is the subject of this appeal, there can be no doubt that he has failed to do so. Both Courts in India have come to this conclusion, and considering that this disposes of Government's claim to the land, they have, as their Lordships think, assumed that it must be the property of the respondent. Their Lordships are unable to concur in this assumption. In their opinion the respondent, in order to succeed in his claim to compensation for the land, must prove his title to it in the ordinary way. The plot in question may have been privately owned, and may have passed from such owner to the respondent, but there is in their Lordships' opinion no ground for assuming this: it must be a matter of proof by the respondent, and it is upon this that the respondent's claim to the compensation money must stand or fall.

The title vouched by the respondent is remarkable for the meagreness of its written record. There is a mortgage dated in 1889, which covers a somewhat indeterminate fraction of the property. This is implemented by a certificate of purchase by the respondent of the same fraction at a Court sale in January, 1899—presumably under a decree passed on the mortgage. Then there is a second sale certificate of August, 1899, under which one Jogesh Chandra Sen, who may have been a co-parcener of the respondent, purchased another fraction of the property, and a third sale certificate under which the respondent purchased

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the interest of his mortgagor in apparently the larger part of the property. It is impossible to make out from these documents any title at all to the whole of the 5¼ *bighas* which the Government has now acquired, but this does not appear to have been noticed in the Indian Courts, and their Lordships do not desire to found their judgment in any way upon this deficiency. In addition to these documents there is the deposition of the respondent, who says that he has been in possession since 1900, but has no title-deeds, and had never seen any of prior date to his mortgage. It is said that the recitals in this deed carry back the possession to 1871, but their Lordships doubt if these recitals are evidence as against the appellant—*see* per Lord Buckmaster in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*[1]. It is admitted that the sale certificates passed nothing but the right, title and interest of the judgment-debtor, whatever it was, and the mortgage without anterior title-deeds is of no more determinate value.

Their Lordships think, therefore, that the title of the respondent must be taken to be a purely possessory one, and whether dating from 1900 or from 1871, seems to be immaterial, as it is clear from the map referred to above that the property had been included in the cantonment at all events from 1851.

No Government assessment has ever been paid by the res-
nt, nor apparently has the land ever been assessed. No
ce was offered that it was *lakhiraj* land and so exempted
assessment, though this appears to have been the respond-
s contention before the Special Judge. Nor is there any
ggestion that the land has been entered in the land registers as private property, though under the provisions of Part IV, sections 38 to 44 of the Bengal Land Registration Act (VII of 1876) such registration is compulsory. Their Lordships would have expected that the respondent, who is an attorney, when taking a mortgage of the property in 1889 would have made some enquiry as to registration, and would, if he believed that the land was the property of his mortgagor, have taken steps to register his mortgage, as he was entitled to do under section 44 of the Act, or would at least have seen to the registration of his title, when he bought at the Court sales. It is to be noted that the provisions of section 38 apply not only to "estates," *i.e.*, land paying Government revenue, but

1. (1916) L.R. 43 I.A. 249 at 254; I.L.R. 44 C 186; 31 M.L.J. 563 (P.C).

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to revenue-free property or any interest therein, and section 42 covers the case of any person succeeding to any proprietary right in an estate or revenue-free property, whether by purchase, inheritance, gift or otherwise. In fact the only entry in the Government registers, so far as is disclosed by the record of this case, is that in the *Mousawari* Register already referred to. Their Lordships recognise that such an entry is no proof of title, but it is at least of considerable significance in the absence of all other records.

Under these circumstances their Lordships are unable to hold that possession of the land with the house standing upon it from 1900, or even from 1871, if that can be assumed, is any proof of title to the land. It is in every way consistent with a mere cantonment tenure which has never been denied by Government, but which would carry with it no property in the land. Indeed the facts that no assessment is levied, and that no private title has been registered suggests this as the more probable origin of the respondent's possession.

Reference has been made in the arguments to the case of *Robinson* v. *Carey*[2], which came before the High Court of Calcutta in 1865. In this case, which was concerned with another house in the Barrackpore Cantonment, Norman, J., the trial Judge, delivered himself as follows:—

> "With respect to the property of the soil in Cantonments, where th is no evidence that the land is part of a settled estate, there being no that it pays revenue to the Government, nothing in fact to show is held by any other tenure, I think it must be taken that the soi property of the Government, and that the occupation by the ow bungalows is permissive."

Whether this would be sufficient to establish the title Government where the burden was upon them, may be open t doubt, but their Lordships think that it affords a very cogent answer to a merely possessory title.

In *Ghaswala* v. *The Secretary of State*[3], a case very similar to the present one, but dealing with a house in the Poona Cantonment, came before this Board. The Bombay Regulations by which the case was governed provided definitely that no private property was to be included in the cantonment, and the absence of any corresponding provision in the Bengal Regulations no doubt weakens the application of the decision. But much of Lord Robson's judgment is in point. There, as here, a paper title of sorts was relied on, but it was put aside as of

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2 Coryton's Report, p. 137.
3 (1911) L.R. 38 I.A. 204: I.L.R. 36 B 1: 21 M.L.J. 1100 (P.C.).

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no weight, and the real question was the effect of long possession. The cantonment was founded in 1822, and official correspondence was put in which showed, as in the present case, that in the immediately ensuing years the military authorities were arranging for the indemnification of the expropriated owners.

"It seems reasonably clear therefore," Lord Robson says, "that from the first the military authorities were conscious, as they could scarcely help being, of the inconvenience and risk of having absolute owners of land within the Cantonment, and of the necessity of propitiating them by proper settlements and compensation Even if the appellant established that his house was built at or before the time the Cantonment was formed, there is still, under the circumstances of the case, a strong probability that he was duly compensated along with other proprietors for the change in his position as owner to that of licensee "

He goes on to point out that this "probability" is made stronger by the provision of Bombay Regulation III of 1826, which laid down that private property was not to be included in the cantonment limits, and he continues (p. 216):—

"In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that the possessor or his predecessors-in-title were owners in fee The presumption is all the other way. . . . . ."

On the whole, therefore, their Lordships have come to the conclusion that the respondent has not established his title to the land as apart from the buildings, and they will humbly advise His Majesty that the decrees of the Special Land Acquision Judge and of the High Court should be set aside and award of the Collector restored. The respondent must pay costs of the appellant throughout.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondent: *Watkins & Hunter.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Canada.]

PRESENT:—THE LORD CHANCELLOR, LORD BLANESBURGH, LORD DARLING, LORD TOMLIN AND LORD RUSSELL OF KILLOWEN.

The Bank of Montreal .. *Appellants**

v.

The Dominion Gresham Guarantee and Casualty Company .. *Respondents.*

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The Bank of Montreal *v.* The Dominion Gresham Guarantee and Casualty Company.

Principal and agent—Holding out—Authority only to draw bills of exchange—Purchase of drafts by Company—Fraud by agent—Drafts made by agent payable to himself—Estoppel—Ratification—"Lulling to sleep"

*P.C. Appeal No 1 of 1930. 17th July, 1930.

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A company passed a resolution authorising any two of four specified officers to make, draw, sign, accept or endorse bills of exchange and other commercial paper on behalf of the Company. The resolution was duly communicated to the Company's bankers. In order to pay its creditors, the Company, was in the practice of drawing cheques to the order of their bank and purchasing bank drafts *R*, the accountant of the Company, was one of the four specified in the resolution and was invariably one of the signatories to almost all the cheques so drawn by the Company He fraudulently got some of the cheques certified and in the drafts purchased by means of those cheques, filled in his own name as that of the person in whose favour the drafts were to be prepared, obtained the drafts and misappropriated the proceeds It was contended by the bank that *R* was held out by the Company as their agent and that they were estopped by their conduct from claiming the amounts from the bank.

Held, the bank was not entitled to deal with the cheque except upon a proper authority from the Company and, until the proper authority was forthcoming, they ought to have retained the cheque The resolution of the Company, far from being any such authority, excluded the possibility of an inference that any officer of the Company had a general authority to direct the application of the money belonging to the Company.

The so-called doctrine of lulling to sleep can only depend upon estoppel or ratification. That this fraudulent dealing had been practised in a series of transactions was no proof of negligence on the part of the Company They had no idea of the irregularity and, apart from the authority to draw bills of exchange, they had conferred no authority on *R* to select the name of the person to be inserted in the draft No question of estoppel or ratification can, therefore, arise.

Appeal No 1 of 1930 from a decree of the Supreme Court of Canada, dated 27th May, 1929.

Sir F. B. Merriman and *F. J. Tucker* for appellants.

J. A. Mann, K.C. (Canadian Bar) and *Frank Gahan* f respondents.

17th July, 1930. Their Lordships' judgment was vered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal from a judgment, da the 27th May, 1929, of the Supreme Court of Canada, whereb the Court by a majority reversed a judgment of the Court of King's Bench in appeal and directed judgment for 7,565.61 dollars and costs in all Courts to be entered in favour of the present respondents against the present appellants.

The action arises out of frauds committed by one K. V. Rogers while employed as chief accountant by Willis Faber & Company of Canada, Ltd., who will be hereafter referred to as the customers.

Rogers had entered the customers' service in 1907 and became their chief accountant in 1912. The fidelity of Rogers was insured by the customers with the respondents for one year from the 23rd May, 1921. During that year frauds were committed by Rogers and the customers recovered under their policy from the respondents 7,565.61 dollars in respect thereof,

Thereupon the respondents, being admittedly subrogated to the rights of the customers, began the action of which this appeal before their Lordships' Board is the final stage to recover from the appellants, who were the customers' bankers, the amount paid by the respondents to the customers under the policy on the ground that the frauds of Rogers were the outcome of the appellants' negligence.

The customers carried on business as insurance brokers. In the ordinary course of their business the customers had occasion from time to time, in order to discharge obligations to creditors in New York, to purchase from the appellants, bank drafts on New York.

On the 8th July, 1912, the Board of Directors of the customers passed a resolution in the following terms:—

"That any two of the following persons, namely, Mr. Raymond Willis, President, Mr. O W. Dettmers, Director, Mr E. N. Mercer, Director, and K. V. Rogers, Accountant, be and they are hereby authorized to make, draw, sign, accept or endorse bills of exchange, promissory notes, cheques, orders for payment or other commercial paper on behalf of the Company, and that Mr. Raymond Willis, President, and Mr. O. W. Dettmers, Director, and Mr. E. N. Mercer, Director, and either of them singly, be and they are hereby authorized to make all contracts and engagements other than the foregoing for and on behalf of the Company."

This resolution upon being passed was communicated to the appellants and remained operative throughout the period of he transactions to which the present appeal relates.

Between November, 1918, and January, 1922, a series of k drafts on New York were purchased by the customers the appellants.

The course of business when a bank draft was required to pay a creditor was as follows: The customers, usually through Rogers, first ascertained from the appellants on the telephone the current rate of exchange. Rogers then prepared a cheque payable to the appellants' order but never to his own order for a sum approximately corresponding in amount (after allowing for difference in exchange) to the sum for which the bank draft was required. The cheque so prepared was placed by Rogers before one of the directors, Mr. Dettmers or Mr. Mercer, for their signature, either with a statement in writing prepared in the office of the customers, purporting to show the amount due to the creditor, or with an oral explanation by Rogers of the purpose for which the cheque and corresponding draft were required. The cheque was then signed on behalf of the customers by two of the persons named in the resolution of the 8th July, 1912. In fact, Rogers was one of the signa-

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tories to almost all the cheques used in connection with the purchase of drafts.

When the cheque had been signed Rogers took it, without any other document or written instructions, to the appellants' bank. At the bank Rogers first handed in the cheque for certification, and having received it back certified, went to the draft department of the bank and filled in upon one of the appellants' forms a requisition note indicating (1) that a draft on New York was required, (2) the amount of the draft, (3) the name of the person in whose favour the draft was to be made out, and (4) the name of the applicant for the draft.

In every case Rogers inserted the name of the customers as applicants for the draft.

Having filled in the requisition note, the note and certified cheque were handed by Rogers to the appellants' clerk, whose duty it was to issue drafts, and the draft was thereupon handed out to Rogers, any slight difference due to the rate of exchange between the amount of the cheque and the amount actually required for the purchase of the draft being adjusted by Rogers by the payment or receipt of cash.

Between November, 1918, and January, 1922, 106 drafts were purchased in the manner which has been described. Of these purchases, 50 were made during the currency of the policy.

After January, 1922, it was for the first time discove that Rogers had on 41 purchases out of the 106, by inser in the requisition notes his own name as that of the pers whose favour the drafts were to be prepared, obtained fr the appellants drafts in his own favour and had misappropriated to his own use the proceeds of the drafts, covering his defalcations by falsifying the customers' books.

Of the 41 misappropriations, 20 occurred before the policy was issued. The remaining 21 occurred during the currency of and were covered by the policy, and constitute the matters in respect of which the 7,565.61 dollars were recovered by the customers from the respondents.

The present action was begun on the 15th May, 1924, by the respondents against the appellants.

On the 5th May, 1927, Mr. Justice Duclos dismissed the action with costs on the ground (*a*) that the customers were estopped by their own negligence, (*b*) that they could not impose a greater standard of care upon the appellants than they

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exercised themselves, (*c*) that the customers held out Rogers as their agent and gave the appellants every reason to believe he was acting within their authority, (*d*) that the fact of Rogers asking for drafts to his own order was not sufficient to put the appellants on enquiry, and (*e*) that even if the appellants' suspicion might have been aroused on the first occasion such suspicion was allayed and lulled to sleep by the long series of similar transactions without objection or demur on the part of the customers and without notice to the appellants of any irregularity.

An appeal to the Court of King's Bench in appeal was dismissed on the 16th April, 1928.

The respondents appealed to the Supreme Court of Canada. On the 27th May, 1929, the Supreme Court by a majority allowed the appeal. The judgment of the majority was delivered by Mr. Justice Duff and was concurred in by Newcombe, Lamont and Smith, JJ. Mr. Justice Rinfret dissented.

Their Lordships are of opinion that the majority of the Judges of the Supreme Court of Canada arrived at a right conclusion in holding that the appellants were liable.

It is to be observed *in limine* that the customers being a limited company were capable of speaking and acting only through agents duly authorised in that behalf in accordance with their constitution and that as between the appellants and the customers the duty of the former must *prima facie* be measured in the light of the resolution of the 8th July, 1912, which had been communicated to them.

In each of the instances under consideration the cheque drawn upon the appellants was duly signed in accordance with the resolution, and the appellants were justified in debiting the customers' account with the amount.

But nothing was owing from the customers to the appellants in whose favour the cheque was drawn. The money, therefore, in the hands of the appellants remained the money of the customers. What was the duty of the appellants in dealing with it?

In their Lordships' judgment the appellants were not entitled to deal with it except upon a proper authority from the customers. If after certification each cheque had been retained by the appellants until the proper authority was forthcoming, no question could have arisen. The appellants did not take this course. They were content to rest on the fact that Rogers produced a cheque duly signed. They returned the certified

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cheque to Rogers and accepted his sole direction as to how the money was to be applied. The requisition note was nothing but a direction by Rogers together with a representation by him as to the party on whose behalf he made it. If the requisition was made on behalf of the customers it did not answer the requirements of the resolution the existence of which excluded the possibility of an inference that any officer of the customers had a general authority to direct the application of the customers' money. Rogers, in fact, had no authority, actual or ostensible, to select the person in whose favour the bankers' draft was to be prepared.

If the case had related to a single transaction the appellants could, in their Lordships' judgment, have had no defence. Does the matter stand otherwise because the customers' officers were negligent in their business methods or because a number of instances forming part of a series of similar transactions are involved?

As between the customers and the appellants the duty of the appellants was constitutionally prescribed by the resolution of the 8th July, 1912, and could only be altered by some direction of equal constitutional validity. No act or omission of the customers' officers lacking such constitutional validity, whether such acts or omissions were or were not negligent as between such officers and the customers, could relieve the appe[illegible] lants of any part of their obligations. The negligence re[illegible] on here was nothing more than a series of acts and omiss[illegible] which might well have given the customers ground of [illegible] plaint against their own officers, but did not justify any r[illegible] tion by the appellants of the vigilance which they owed to [illegible] customers.

Nor, in their Lordships' judgment, can the appellants find comfort in the fact that the transactions complained of were incidents in a series of similar transactions. In this connection the so-called doctrine of lulling to sleep has been invoked. Neglect of duty does not cease by repetition to be neglect of duty. If there be any doctrine of lulling to sleep it must depend upon and can only be another way of expressing estoppel or ratification.

It was admitted before their Lordships that estoppel had no place in this case.

Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies.

Here the ratification, if any, must have been ratification of authority in Rogers to direct the appellants how to deal with

the proceeds of the cheques and in particular to specify at his discretion in what names the drafts were to be prepared.

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As the customers and their directors were throughout in ignorance of what Rogers was from time to time doing and never intended him to have authority in any instance to select for insertion in the draft his own name or any name except a particular name, their Lordships are of opinion that in the circumstances of this case ratification cannot be made out.

In the result, therefore, none of the points upon which the appellants have relied can avail them, and in their Lordships' judgment the appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Tinklaters and Paines.*

Solicitors for respondents. *Lawrence Jones & Co.*

S.R. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

Raja Damara Kumara Venkata Lingama Nayanim Bahadur Varu .. *Appellant** *(Plaintiff)*

v.

naganti Jagannadha Rayanimgar and others .. *Respondents (Defendants).*

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Raja Damara Kumara Venkata Lingama Nayanim Bahadur Varu
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ust—Person assuming position of trustee and obtaining declaration sent of parties from Court—Subsequent repudiation of trust by from trustee—Permissibility

When a person assumes the position of trustee in respect of property as to which there is no previous dedication and obtains from Court a declaration by consent of parties that that property is trust property, a subsequent alienee from him on the footing that the property is his own property is entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation that the property is not in fact trust property.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor, dated 16th September, 1924, in O.S. No. 18 of 1922.

The Advocate-General and *A. Ramachandra Aiyar* for appellant.

P. Venkataramana Rao, D. P. Sundararamayya, P. Chenchiah and *C. Basu Deo* for respondents.

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*Appeal No 99 of 1925. 23rd April, 1930.

The facts of the case are fully set out in the judgment.

The Court (Kumaraswami Sastri and Pakenham Walsh, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—This appeal arises out of a suit by the present Rajah of Kalahasthi (1) to declare that the mortgage-deed, dated 21st September, 1912, and the Original Suit No. 7 of 1916 on the file of the Sub-Court, North Arcot, and all the subsequent proceedings in execution of the decree including the sale are all fraudulent, collusive and nominal transactions, (2) to declare that they are not binding on the plaint trust, and (3) to direct the defendants to deliver possession of the trust village Yerpedu to the plaintiff with mesne profits and costs of the suit. The allegation that the mortgage and sale were fraudulent, collusive and nominal transactions was given up in the suit and the sole question argued was whether the village Yerpedu was a trust village or not. The Lower Court found that the trust had not been made out and dismissed the suit. Against this decision the plaintiff appeals.

In order to understand the case, it is necessary to give a brief history of what has happened with regard to this village of Yerpedu. In 1801 there was a special commission which was to effect the settlement of zamindaries working along the lines which were afterwards laid down in Regulation XXV of 1802. The commission deputed one Mr. Stratton to make a report on the zamindaries of Venkatagiri, Kalahasthi and Karvetnagar. The scheme was to exclude from the total peishcush such lands a *lakhiraj* or lands exempt from payment of Government reven Mr. Stratton submitted his report, and in Ex. FF, which is ca "Stratton's Register," the entry shows this village of Yerped an alienated village. When, however, the settlement was ac made, it was decided that, as this Kalahasthi zamindari ha already paying a fixed peishcush to the Nawab of Arcot, it w be enough if this peishcush were adopted and to th were added a commuted value of the military services the Zamindar had to render. Consequently in the sanad granted there is no deduction for the *lakhiraj* lands as was made in the case of ordinary zamindaries. In 1907 the Government started an enquiry about such inams with the result that the Rajah of Venkatagiri, who held a sanad similar to that of the Kalahasthi Rajah, filed a suit in which he asked for an injunction restraining the Government from holding any investigation into the nature of and title to inams and *lakhiraj* lands in his zamindari and from dealing with the same under the inam rules or resuming them or assessing them to public revenue. He was successful in all the Courts here, and also when the matter was carried up to the Privy Council which gave its decision on the 15th of July, 1921. This is reported in *The Secretary of State for India in Council* v. *The*

Rajah of Venkatagiri[1]. The date of the judgment of the High Court is the 29th of March, 1916. In 1896 the then Rajah of Kalahasthi, Akkappa Nayanim Bahadur Varu, mortgaged this village of Yerpedu along with other properties to the Rajah of Venkatagiri under Ex. VII The latter filed O.S. No. 2 of 1907 on this mortgage on the 14th of March, 1907. By that time the Rajah of Kalahasthi who had mortgaged the properties was dead and had been succeeded by his son Thimmanayanim Bahadur Varu. (*Vide* Ex. VIII,. an extract from the suit register.) A decree was obtained on the mortgage, and, when the Rajah of Venkatagiri wanted to execute it, the Rajah of Kalahasthi filed O.S. No. 21 of 1910 on the file of the Temporary Sub-Court of North Arcot to have it declared that this was a trust village of which he was the trustee, that his father had no right to alienate the village and that it should be declared a trust property. The plaint in that suit is Ex. GG. It may be noted that neither in the written statement in the suit on the mortgage, nor even when the execution application Ex. V was put in, did the Rajah of Kalahasthi allege that this was trust property which his father had no right to alienate. The Rajah of Venkatagiri did not contest O. S. No. 21 of 1910 and a decree was passed accordingly. Probably, the Rajah of Venkatagiri thought that he had sufficient security for his mortgage or was satisfied that it would be paid soon and so he did not raise any contention in respect of this property. We find that the decree was fully satisfied in 1914 and that, not by the sale of the mortgaged property but by payment out of Court. *Vide* the last ...r on Ex. V, dated the 6th of March, 1914. After obtaining ... decree, Thimmanayanim Bahadur Varu mortgaged this vil... ...f Yerpedu on the 21st of September, 1912, to the present 1st ...ant. The latter filed O.S. No. 7 of 1916 against the Rajah ...e Sub-Court of North Arcot and obtained a decree. He ...ought the village to sale, purchased it himself and took delivery of it on the 2nd of December, 1919. In that year the Rajah, Thimmanayanim Bahadur Varu, died and was succeeded by his son, the present plaintiff, and he instituted this suit on the 15th of March, 1922, to have it declared that the mortgage to the 1st defendant and the purchase by the latter in Court auction were invalid as the village was trust property. The 1st defendant is the brother-in-law of the late Rajah. Two other brothers of the 1st defendant had been added as defendants 2 and 3 but were struck off as being unnecessary parties.

In 1907 the then Rajah of Kalahasthi who had executed the mortgage-deed of 1896 to the Rajah of Venkatagiri was between two cross-fires. On the one hand, the Rajah of Venkatagiri was

1. (1921) L.R. 48 I.A. 415· I.L.R. 44 M 864· 41 M.L.J. 624 (P.C.),

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suing him on his mortgage and the Rajah of Kalahasthi was countering this by pleading that the property was trust property; on the other hand, the Government were trying to demand the village as inam property and if he were to meet that demand he would have to declare it to be an ayan village. It is obvious, therefore, that no particular importance can be attached to the various contradictory titles put forward by the Rajah of Kalahasthi from 1907. He at first made a cautious statement, Ex. S, to the Revenue authorities. It seems likely that he then squared up his difficulties with the Rajah of Venkatagiri. Subsequently he specifically denied to the Government that this was an inam village. (*Vide* Ex. XVIII and Ex. D.) After the execution of the mortgage to the 1st defendant, it is conceded by both sides that, in subsequent suits to which the 1st defendant was not a party any attitude taken up by the Rajah of Kalahasthi is not of much use in determining the question whether this is trust property or not, so we need not go into these matters deeply.

The Subordinate Judge has fully discussed the evidence on the point whether Yerpedu was gifted for charity. Up to the year 1907 it is perfectly clear, as argued by the learned Government Pleader who appeared for the respondent, that the only documentary piece of evidence to show that this village Yerpedu was dedicated to the choultry is Ex. FF, Mr. Stratton's report. There is one earlier document, Ex. WW 1, which is called Huthavali (income) account of Yerpedu for 1796. The learned Subordinate Judge has correctly summed up the position in savin "From the contents of the account I learn that not alone the Kat badi on inams to the village but more than a third of the g rents and half of money rents were being remitted to the Z dar for his personal use." All the documents up to the yea negative the idea that this village was entirely dedicated trust. They show at the most that some paddy used to be s from it, generally about a putti, by the Samasthanam which was devoted to the charity. But as remarked by the learned Subordinate Judge, who has carefully set out the evidence, it is only a part of the income of this village that was spent for the purposes of the charity and it is clear that certain other villages were contributing more. The explanation attempted is that these villages were only indented on when there was not enough grain at Yerpedu. That is belied by the documentary evidence which shows that even while there was grain at Yerpedu it was not utilized for this purpose and indents were made on other villages for supplies. We may also note that in one year supplies were taken from Yerpedu for a purely Muhammadan celebration; and in one year we find (from Ex. XXXI) that nothing at all was sent from Yerpedu to the choultry. Therefore it is highly unlikely that the entire income of the village would have been dedicated to the choultry

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which was intended for pilgrims going to Hindu temples. Then again we have a series of grants of land in Yerpedu village which are inconsistent with the village being dedicated to the charity. *Vide* Ex. XXXV, dated 1844, Ex. XXXVI, dated 1845, and Exs. XXXVII. and XXXVIII. The Lower Court gives the dates of these latter documents as 1852 and 1853, but there appears to be some doubt as to whether they should not be 1792 and 1793. Then we have a series of leases granted by the Zamindar of this village in which it is classed with other ayan villages without any distinction and in none of them is the lessor described as a trustee. One of these leases is Ex. XLI, dated the 3rd of March, 1900. It is in favour of the Court of Wards which was then managing the estate. Accuracy in describing the property as trust property and the lessor as trustee might be expected here, but we find no such description.

Turning now to Ex. FF, Mr. Stratton's report, which, as stated above, is the only document before 1907 which supports the view that the village was trust property, this report was admittedly not acted upon, because no sanad was ultimately granted on that basis; as it proved unnecessary to go into the question whether any lands were *lakhiraj* and inam. It is open to doubt, in the light of the observations of their Lordships of the Privy Council in *Venkateswara Iyan* v. *Shekhari Varma*,[2] whether this report is evidence at all in the circumstances. In that case certain paimash accounts for 1798-99 and 1805-1806 were relied on by [th]e plaintiffs. Their Lordships remark:

"On looking at these accounts two observations at once occur. The [illegible]st is that, putting them at the highest, they are only evidence of posses-[illegible], having been rendered to Government for the purpose of informing [illegible] from whom they were to demand the revenue. The second is that [illegible]an hardly be said to be public documents at all, for on the face of [illegible]t is stated that they were never confirmed and never acted on. The [illegible] who made these returns may have believed that the lands were [illegible]swam property, but his statement to that effect is a mere private opinion, unless and until it is affirmed or acted on in some public way. It is remarkable that in the suit of 1833 a copy of one of these accounts was refused to one of the litigant parties, on the very ground that the account had never been confirmed, and was only granted on its being discovered that a copy had already been given to his opponent. These documents should not have been treated as evidence."

Mr. Stratton's report no doubt was called for with a view to ascertain whether there were any *lakhiraj* and inam lands in the zamindari, but it was not acted upon for this purpose. Assuming however that it is evidence, we consider that it cannot outweigh the strong documentary evidence which shows that the village was not dedicated to this charity. The utmost that can be said is that paddy was taken from this village as well as from other villages for the choultry. There is nothing to show that a fixed

2. (1881) L.R. 8 I.A. 149; I.L.R. 3 M. 384 at 391 (P.C.).

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amount of paddy was taken, and in one year we find, as stated above, that nothing was spent from this village towards the charity. Further, the grants of land in Yerpedu given by various Rajahs, as stated above, belie any idea of the village being dedicated to charity. On the face of it, therefore, it is clear that Mr. Stratton was misinformed when he reported that the whole village was alienated to charity.

In Appeal No. 283 of 1911, the judgment in which is filed as Ex. YY, Ayling and Srinivasa Aiyangar, JJ., referred to Ex. E in that case which was an appendix to Mr. Stratton's report. This was in a suit relating to the Kalahasthi village. The learned Judges observed:

> "This report is based on the karnam's accounts of the villages of the Zamindari and was prepared for the purpose of showing the total income received by the Zamindar."

We do not know whether the first part of this statement was supported by the evidence in that case. In the present case it can only be said to be a conjecture; but the facts of that case were different because there was a grant, Ex. A, as well as a stone inscription built into the wall of the temple purporting to be a contemporaneous record of the grant. The learned Judges say:

> "Whatever doubts there may be if Ex. A stood alone, we have Ex. M a stone inscription built into the wall of the temple purporting to be a contemporaneous record of the grant No objection was taken to its admissibility and a perusal of the document shows that it was substantially a duplicate of the grant."

In the present case there is no deed of grant of any sort.

In *Konwar Doorganath Roy* v. *Ram Chunder Sen*[3] th Lordships of the Privy Council laid down:

> "A plaintiff who seeks to set aside an alienation of lands on the gr that they are *debutter, i.e.,* dedicated in perpetuity to support the w of an idol, must give strong and clear evidence of the endowmen mere fact that the rents of a particular mehal have been applied for a siderable period to the worship of an idol is not sufficient proof that t mehal is *debutter.*"

In the present case the record shows conclusively that the whole income of the village was not dedicated to charity, that no fixed amount was granted and that in one year nothing at all was granted. Under these circumstances we agree with the learned Subordinate Judge in holding that it is not proved that the village was dedicated to charity.

There is, however, one argument which has been strongly urged upon us. It is a question of law which must be held to have been raised in paragraph 6 of the plaint. It is there stated that "in O.S. No. 29 of 1910, on the file of the District Court of North Arcot, the village has been declared to be a trust village on

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3. (1876) L.R. 4 I.A. 52. I.L.R. 2 C. 341 (P.C.).

a suit instituted by R. D. K. Thimmanayanim Bahadur Varu himself." As noted above, the plaintiff who filed that suit raised no objection in his written statement in O.S. No. 7 of 1916 filed by the Rajah of Venkatagiri, nor in the execution proceedings evidenced by Ex. V, that this village was an inam village though it was quite open to him to do so then, as it was not he but his father who had mortgaged the property. The Rajah of Venkatagiri did not choose to contest this suit O.S. No. 29 of 1910 and a decree was passed accordingly.

It is strongly contended that the judgment Ex. GG precludes the subsequent mortgagee from contending that the property is not trust property and that the mortgagor is not a trustee. (We may note that no issue has been raised whether the mortgagees were dealing with the property *bona fide* as private property without knowing that it was trust property. This was an issue which it was for the defendants to raise and prove if they relied on it.)

Srinivasa Moorthy v. *Venkata Varada Aiyangar*[4], a decision of the Privy Council, is quoted where it was held that no person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to set up an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. *Grant* v. *Grant*[5] is also quoted.

On the other side, *Benode Behari* v. *Manmatha Nath*[6] and *Budh Singh Dudhuria* v. *Niradbaran Roy*[7] are relied on. In the former case, there had been an enquiry by the Government in 1842 and the revenue authorities had issued certain *robokaries* describing the lands as *debutter*. It was argued that these *robokaries* were equivalent to decrees establishing the dedication of property to the idol and might therefore be regarded as documents of title. The learned Judges, Coxe and Chatterjea, JJ., did not accede to this argument. Coxe, J., said:

"Clearly the right of the idol to the land was not in controversy in those proceedings. All that the plaintiff in those proceedings was interested in claiming was that the land, whether it belonged to the idol or not, was subject to the assessment of the rent or revenue In these circumstances it seems to me that the decision cannot be regarded as a document of title."

The other case, *Budh Singh Dudhuria* v. *Niradbaram Roy*,[7] is closely analogous to the present case. In that case it was held that a suit, the sole object of which is to eject a trespasser or to recover possession of trust property from the hands of a person who has acquired it on the basis of an improper alienation by a trustee, does not fall within the scope of section 539 of the Code

4 (1911) L R. 38 I A 129. I.L.R. 34 M. 257· 21 M.L.J 669 (P.C.).
5. (1865) 34 Beav. 623.
6 (1911) 21 C.L.J. 42.
7. (1905) 2 C.L.J. 431.

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of Civil Procedure. What happened there was that the 3rd defendant had executed a mortgage in 1896 in favour of defendants 1 and 2 pledging two items of properties. Subsequently they came to know in certain insolvency proceedings that the mortgagor had described the property in question as *debutter* property. They accordingly corresponded with the 3rd defendant and eventually he executed in their favour an *ekrarnama* admitting that the property was not *debutter*. The property comprised in the mortgage of 1896 formed the subject of a suit in which the appellants were the plaintiffs and a decree was obtained. One of the mortgaged items was sold under that decree and was purchased by the decree-holders. The mortgage debt was not cleared by the proceeds of the sale and the decree-holders tried to proceed against the other item. A suit was brought against them and against the 3rd defendant to remove the latter from the office of trustee and declare the mortgage void. This property had a long history and the Judges held that the earlier documents did not indicate that there was an inalienable endowment. They also found that there was no reason for thinking that the land was ever represented as tied up in an endowment until it was desired to protect the rents and profits of the lands from attachment in the year 1856. Harington, J., says:

"It is true that the contention that the land was endowed land was then successful, and it is true that on that occasion evidence was produced which has not been produced before us, namely the accounts of the dealings of the property, but at the same time as I read the judgment I think it was mainly based on a misapprehension of the nature of the question at issue in the resumption proceedings and on the effect of the decision in thes proceedings That being so, I am not inclined to place any weight on t[illegible] proceedings in 1856-58"

Apparently the learned Judges in that case were only a[illegible] to deal with the judgment in 1856 as a piece of evidence. I[illegible] present case the precise contention raised before us does not a[illegible] to have been raised or argued as a specific issue at the hearin[illegible] there being only a general issue as follows:

"Is the plaint village trust property, and if so, are the mortgage and sale in favour of the 1st defendant binding on the trust?"

The issue, however, seems wide enough to cover the legal contention. The facts in the Calcutta case are almost exactly similar to those in the present case, and in one way it was a stronger case because in the legal proceedings of 1856 the evidence was actually led as to the nature of the property. It does not appear to us to be at all material for deciding the legal fact in question whether the judgment was based on a misapprehension as to the nature of the question at issue in the resumption proceedings. It may be argued that the decision of the Privy Council in *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[4] can be distinguished from the present case, because

4. (1911) L.R. 38 I.A. 129. I.L.R. 34 M. 257: 21 M.L.J. 669 (P.C.).

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although the plaintiff in O.S. No. 29 of 1910 certainly accepted the position of trustee, he did not acquire the property by the decree but only got rid of fighting a mortgage created upon it. In the Privy Council case possession of properties under a will had been obtained. We consider that this legal question is of great importance. No decision of this Court has been quoted upon it. Whether the dictum of their Lordships of the Privy Council in *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[4] is to be taken as overruling the view held in *Budh Singh Dudhuria* v. *Niradbaran Roy*[7] is not quite clear. As we feel some doubt as to what the real implication of their Lordships' decision is in a case like the present we refer the following questions to a Full Bench:—

(1) When a person assuming the position of trustee in respect of property as to which there was no previous dedication obtains from Court a declaration that that property is trust property and acts as such trustee, has he any title to mortgage the property on the footing that it is his private property?

(2) Is a subsequent alienee from him entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation that the property is not trust property?

The Advocate-General (*A. Krishnaswami Aiyar*) and *A. Ramachandra Aiyar* for appellant.—The effect of the decree in the previous suit was to create a valid trust in respect of the suit village. A person accepting the position of trustee cannot resile from it and the alienee presumably having notice is affected by the same disability. *Srinivasa Moorthy* v *Venkata Varada Aiyangar*[4]. The case in *Budh Singh Dudhuria* *Niradbaran Roy*[7] is not an authority to the contrary. The fact that the trustee did not hold possession as trustee is immaterial. See *Pazhaniandy Tarakan* v. *Murukappa Tarakan.*[8] The mere fact that the trustee alienates the property as his personal property will not shift the *onus* of proof on the succeeding trustee. The *onus* is on the alienee to show that he is a purchaser for value without notice.

[*The Chief Justice.*—The decision in *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[4] does not say that the disability applies to transferees.]

The trustee cannot discharge the trust by simply effecting a transfer. The general principle of law is that a transferee with notice is in the same position as the trustee himself.

P. Venkataramana Rao, P Chenchiah and *C. Basu Deo* for respondents.—In this case the existence of the trust has

4 (1911) L.R. 38 I A. 129· I.L.R. 34 M 257 21 M.L.J. 669 (P.C.).
7 (1905) 2 C L J. 431 8 (1925) 50 M.L.J. 49.

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not been proved. The decree in the prior suit did not have the effect of creating a trust for the first time. At best it can only be relied on as evidence of a pre-existing trust. It is open to the defendants to plead that the trust was non-existent. The prior decree can merely take effect as a private contract between the parties to that suit. The title continues with the defendant in spite of the judgment in the prior suit. Estoppel cannot alter the real nature of the transaction nor confer a title: *Simm* v. *Anglo-American Telegraph Co.*[9] Further, in order to depend on estoppel some prejudice must be proved. In *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[4] the existence of the trust was not contested. *See* judgment of the High Court: *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[10]. Here the property was mortgaged in the mortgagor's individual capacity and hence the defendants are not debarred from disputing the trust. Reference was made to *Bholonath Sen* v. *Balaram Das.*[11]

Counsel was stopped.

A. Ramachandra Aiyar replied.

The Court delivered the following

Ananta-krishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—In this case two questions have been referred to the decision of the Full Bench and, as it is admitted, that if our answer to the second question should be against the appellant, there is no necessity to answer the first question, we proceed to state such facts as are necessary to make our answer intelligible.

The plaintiff is the present Rajah of Kalahasthi and instituted the original suit out of which this reference arisen for a declaration that the mortgage deed, dated the of September, 1912, executed by the Kalahasthi Rajah, wh we may call here Rajah No. 2, in favour of the 1st defendan is not binding upon the trust, for a declaration that the village in question Yerpedu is property appertaining to a trust in connection with a choultry-charity, and to recover possession of the property. The plea of the defendants was that in fact there was no trust at all, that the properties belonged to the Rajah of Kalahasthi in his personal capacity and that the mortgage was perfectly valid The second question which has been referred to us is whether the defendants are entitled to set up the defence that they did in the present case, namely, that there was no real trust with reference to the village in question.

4 (1911) L.R. 38 I A 129. I L R 34 M 257: 21 M L.J. 669 (P.C.)

9 (1879) 5 Q B D. 188 at 206

10 (1906) I.L R 29 M 239: 16 M.L.J. 238

11. (1922) 47 M L.J. 258 (P.C.).

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The history of this village in so far as the same is disclosed by the evidence in this case is as follows:—In 1896 the Rajah of Kalahasthi, who may be called as Rajah No. 1—by name Akkappa Nayanim Bahadur Varu—mortgaged this village to the Rajah of Venkatagiri under Ex. VII. The Rajah of Venkatagiri filed O.S. No. 2 of 1907 to recover the amount due on the basis of that mortgage, making the mortgagor's son a party to the suit. The suit was in fact filed against Rajah No. 2 the mortgagor Rajah No. 1 having died in the meantime. There was a decree passed in favour of the plaintiff. Subsequently, however, Rajah No. 2 instituted O.S. No. 21 of 1910 on the file of the Court of the Subordinate Judge of North Arcot against the Rajah of Venkatagiri for a declaration that there was a trust in favour of a choultry created in respect of the suit village long prior to 1896, and that the mortgage created in 1896 by Rajah No. 1 in favour of the defendant (the Rajah of Venkatagiri) was not binding on the trust. The defendant not having opposed the suit, a decree "by consent" was passed in favour of the plaintiff as prayed for. Rajah No. 2 mortgaged the village in question in 1912 in favour of the present 1st defendant for a sum of Rs. 80,000. In the mortgage deed it was recited that the properties belonged to the mortgagors, and no mention of any trust was made in the mortgage. On e basis of that mortgage, the mortgagee filed O.S. No. 7 of '6 on the file of the Court of the Subordinate Judge of North ›t to recover the amount due and obtained a decree. In tion of the decree, the decree-holder became himself the .iaser of the properties and also obtained possession of em. Rajah No. 2 seems to have died in December, 1919. Subsequent to that, Rajah No. 3 of Kalahasthi instituted in 1922 the present suit for a declaration that the village of Yerpedu is trust property, and for recovery of possession of this village on the footing of its being trust property, the Rajah of Kalahasthi for the time being being alleged to be the trustee. The plea of the defendants that there was no trust at any time regarding this village was upheld both by the Trial Court and also by the two learned Judges before whom this appeal came on in the first instance and who have made this reference to us. Having regard to the observations made by the Privy Council in *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[4] the learned Judges were in doubt as to whether it was open to a person who assumed the position of a trustee to mortgage the pro-

4 (1911) L.R. 38 I.A. 129: I.L.R. 34 M. 257 at 265: 21 M.L.J. 669 (P.C.)

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perty subsequently as his private property. The second question referred to us is whether the 1st defendant, the mortgagee from Rajah No. 2, could set up the defence that there was no trust at all and that the property was liable for the amount of the mortgage due to him. From the above statement of facts, and from the finding of the two learned Judges, concurring with the finding of the Lower Court, that there was in fact no trust with reference to this property, it would follow that if it be held that it is open to the 1st defendant to raise such a plea, then he has got a complete defence to the suit. The only question, therefore, is whether it is open to the defendants to raise such a plea It was argued by the learned Advocate-General on behalf of the appellant that the effect of the decree in O.S. No. 21 of 1910 was in fact to create a valid trust in respect of this particular village In the plaint in O.S. No. 21 of 1910 (Ex. GG) it is stated in paragraph 1 that the dedication of the village Yerpedu was made "long ago" for the maintenance of a choultry-charity and that the Rajahs of Kalahasthi were the hereditary trustees thereof. In paragraph 7 it is mentioned that the mortgage of 1896 was not binding upon the trust, which, it is stated, had been in existence for a long time. We are unable to agree with the contention of the learned Advocate-General that the effect of the decree in O.S. No. 21 of 1910 is to create a trust for the first time in respect of this propert It was not anybody's case in O.S. No. 21 of 1910 that t village in question was for the first time dedicated to trus Rajah No. 2 in 1910. The case was that a trust had created long prior to the suit of 1910; otherwise it is im ble to understand how a mortgage created in 1896 cou declared to be not binding on the property. If no trust existe already, it does not seem to have been the intention of anybody to create a trust for the first time in 1910. Anyhow, different considerations would arise if the latter plea had been put forward That was not so alleged in the plaint, and, as we read the decree, (Ex. GG 1), that was not the decree passed in that case.

In any event, it is enough for our present purpose to state that the effect of that decree, which was passed by consent of parties, could not be more than a private contract between the then plaintiff and the then defendant The present defendants took the mortgage of 1912 from the Rajah of Kalahasthi No. 2 not as representing any trust but in his private capacity and on the footing of the property being the mortgagor's own property; and that being so, we do not think that there is anything

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to prevent the present defendants from alleging and proving that there was no trust at all as alleged by the plaintiff. In this case any disability which it was argued attached to Rajah No. 2 would not, in our view, attach to the defendants. As far as the defendants are concerned, the proceedings in O.S. No. 21 of 1910 could not be regarded as anything more—at the highest—than a piece of evidence, to be considered along with the other evidence in the case, in deciding whether any trust existed. In this view of the case we do not think it necessary for us to consider the effect of the observation of the Privy Council in *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*.[4] That would be necessary only in case we propose to answer the first question referred to us; and it is admitted that, if our answer to the second question should be against the appellant, it is not necessary to decide the first question. We accordingly hold that it is open to the defendants to plead that there was no trust at all in this case, and that, on the finding of the Trial Court, confirmed by the learned referring Judges, that there was in fact no trust at all, the suit as against the defendants was rightly dismissed. Our answer, accordingly, to the second question is that it was open to the defendants to set up the defence that in fact no trust at all existed with reference to the property in dispute in this case.

We do not, for the reasons already mentioned, consider it cessary to answer the first question referred to us. It is itted that the answer to question No. 2 we have given would se of the whole suit, and that being so, the appeal is sed with costs.

The Chief Justice.—I agree and have nothing further to —.

Beasley

Curgenven, J.—I agree.

Curgenven

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

V. Adinarayana Chetty .. *Petitioner** *(Respondent—1st Defendant)*

v.

Kopparam Narasimha Chetty and another .. *Respondents* *(Petitioners—Plaintiffs).*

Adinarayana Chetty
v.
Narasimha Chetty.

Civil Procedure Code (V of 1908), S. 2 (2)—Order finally determin-

*C.R.P. No. 1399 of 1925 13th November, 1930

4. (1911) L.R. 38 I.A. 129. I.L.R. 34 M. 257. 21 M.L.J. 669 (P.C.).

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ing matter in dispute—Description as decretal order—Order whether amounts to decree—Appeal or revision as the remedy

Where in pursuance of a compromise decree passed in a suit under S 92, Civil Procedure Code, a commissioner was appointed to take an account and the Court after hearing the objections of the parties finally passed an order declaring that the new trustees of the temple were entitled to recover a certain sum of money from the defendants,

Held, that there was a final disposal of the matter between the parties, that the order was a "decree" and appealable as such and hence no revision lay. The mere fact that in such a case the Judge's judgment is headed "order" does not make the decision any the less a decree nor the fact that the office chooses to endorse upon the decree that it is a decretal order.

Cases which hold that a party cannot be deprived of his right of appeal by a wrong procedure being adopted by a Lower Court distinguished

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Vellore, dated 22nd December, 1924 and made in I.A. No. 107 of 1924 in O.S. No. 14 of 1923.

A. C. Sampath Aiyangar for petitioner.

S. Varadachariar and *S. V. Venugopalachari* for respondents.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—Two worshippers of the Sri Kanyakaparameswari Temple in Wallajah filed a suit O.S. No. 14 of 1913 in the Court of the Subordinate Judg Vellore, praying for the settlement of a scheme for the prop management of the temple and its properties, for the appo ment of a fit and proper person as the trustee, for an ac by the 1st defendant of his management of the trust pro belonging to the temple, for a direction to the 2nd defend hand over the jewels belonging to the temple to the trustee appointed and for a direction to the 3rd defendant to hand over the account books relating to the temple and its properties in his possession. It was alleged in the plaint that in consequence of the irregular and improper conduct on the part of the 1st defendant and his supporters the public worship in the temple had ceased to be performed daily. A written statement was filed on behalf of the defendants but the suit was compromised and a compromise decree passed on the 30th November, 1923. By that decree a scheme was settled, approved and annexed to the decree and by that scheme two members of the Komatti caste were to be elected trustees by the majority at a general meeting of the members of the community subject to the confirmation of the Court Two trustees were duly elected and their election was confirmed by Court on the 26th July, 1924. In the

decree there is a direction that either the plaintiffs or the 1st defendant should apply for the appointment of a Commissioner to go into the accounts as between the defendants and the temple and that the newly elected trustees are to take possession of the temple and its properties only on payment to the 1st defendant whatever sum that might be found due by the Commissioner to all or any of the defendants. In pursuance of this decree the plaintiffs filed a petition C.M.P. No. 107 of 1924 in the Subordinate Judge's Court asking for the appointment of a Commissioner to take the accounts of the defendants and on the 15th March, 1924, by consent a Commissioner was appointed. The Commission was returned on the 18th November, 1924 and both sides having filed objections to the Commissioner's report, the Subordinate Judge gave his decision upon it on the 22nd December, 1924. It was ordered and declared that no amount was due by the temple to any of the defendants and that the 3rd defendant owed Rs. 197-2-3 and the 1st defendant Rs. 2,202-5-5 to it and it was further ordered that the 1st defendant was to pay to the temple trustees on behalf of the temple the sum already stated, that the 3rd defendant was likewise to pay the sum found due by him and that both the 1st and the 3rd defendants were to pay to the temple trustees on behalf of the temple Rs. 140-4-0 being their costs of the petition and finally that the trustees of the temple were to execute the decree on behalf of the temple only on payment of Rs. 217-7-0 being the Court-fee on the amounts decreed. It must be mentioned that endorsed on the back of the final order s "decretal order" and that the learned Subordinate Judge's considered decision is headed "order". The 1st defendant has now filed this Civil Revision Petition against the before-mentioned order of the learned Subordinate Judge.

Mr. Varadachari on behalf of the respondents to this petition takes the preliminary objection that no Civil Revision Petition lies, because in his submission the order of the learned Subordinate Judge is a "decree" from which there is an appeal and therefore it is not open to the petitioner to come to the High Court by way of revision. For the petitioner it is argued that the proceedings in the learned Subordinate Judge's Court were by way of a petition, that his order was an "order" and not a "decree" and that hence, there being no appeal, the petitioner's only remedy is by way of a revision petition to the High Court. In support of his argument it is pointed out that the application for the appointment of a Commissioner was made by a Civil

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Miscellaneous Petition, that the learned Subordinate Judge's order is headed "Order" and that when the learned Judge's order was drawn up it was drawn up as a decretal order. These things, it is argued, show that it was not a "decree" but merely an "order". It is further contended that in the mofussil such matters as are left over for determination after the decree is passed such as the appointment of a Commissioner as in this case are usually dealt with on a petition, and that even assuming that such a practice is irregular and the learned Subordinate Judge should not have adopted such a practice, he has done so and delivered an order and that, therefore, the right of the petitioner to come by way of a revision petition cannot be defeated. A number of cases were referred to by the learned Counsel for the petitioner in support of his argument which, to put it shortly, is that where the Court purports to act under a certain provision although not entitled to do so, it must be taken to have assumed its jurisdiction under that provision. One of the cases relied upon is *Bilas Singh* v. *King-Emperor*[1], where it was decided that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. It must be noted that in that case the action of the Court was to deprive the applicant of his right of appeal. In the present case that is not the position at all. The action of the learned Subordinate Judge in passing the order, if it can be described as an order, does not deprive the petitioner of a remedy. In *Khamasa Bewa* v. *Promotho Nath Roy Chowdhury*[2] the question was whether the litigant was by excess of jurisdiction deprived of his right to appeal and it was held that he was not. What happened in that case was that a suit was instituted in a Court the presiding officer of which at the time of the institution of the suit had no Small Cause Court powers. It was held nevertheless that an appeal lay to the District Judge. In *Karam Nawas* v. *Runka*[3] it was held by a single Judge that the right of appeal is determined not by what the Court should have done but what the Court did or purported to do. Another case relied upon is a Full Bench decision of this High Court, namely, *Muthiah Chettiar* v. *Lodd Govinddoss Krishnadoss*[4]. There an order which purported to be passed under O. 22,

1. A.I.R. 1925 A. 737. 2 (1919) 51 I.C. 967
3. A.I.R. 1929 Lah. 376.
4. (1921) I.L.R. 44 M. 919: 41 M.L.J. 316 (F.B.).

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R. 10, Civil Procedure Code, was held to be an appealable order though on the facts the order should not have been passed under that rule. In *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*[5] the Judge had no power to pass orders under section 492, Civil Procedure Code, as regards the issue of an injunction and under section 503 as regards the appointment of a Receiver and it was held that as orders under both the sections were appealable, the High Court was not barred from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against those orders. That again was a perfectly clear case because the Judge had passed an order attaching property, in itself an order seriously affecting the property of a person, and had also appointed a Receiver and neither of those orders could be made without such orders being subject to an appeal. Here again it was the question of whether or not by the adoption of a wrong procedure by a Court the litigant was to be deprived of his remedy. That is not the case here. In *Nasir Khan* v. *Itwari*[6] it was held that the right of appeal does not depend on what a Court ought to have done but on what it actually did. In that case the Court dismissed an appeal on the merits although it ought to have dismissed it not on the merits but for default of appearance by the appellant. No appeal lay from an order dismissing the appeal for default. The matter is quite shortly dealt with on page 670 in the judgment f the Court as follows:

> "The right of appeal does not depend on what the Court ought to done but on what it actually did. What it actually did was to pass ree on the merits. Against such a decree the law allows an a . . . . The respondent's reasoning would deprive the a f the right of appeal just in those cases in which it is most needed.

It is contended that these cases are strong support of the petitioner's argument. It is argued that the order, the subject of this revision petition, was on the face of it an order, that it does not conform to the form of a final decree passed after a preliminary decree directing the taking of an account and that as before mentioned it is described by the Subordinate Judge as an "order" and is embodied in the decree as a decretal order. It is argued, therefore, that the learned Subordinate Judge purported to pass an "order" from which there is no appeal and which can only be revised by means of a petition and that however wrong he may have been in doing so, that is what he has done and not what he should have done. It is further

5. (1900) I.L.R. 23 M. 517: 10 M.L.J. 305.
6. (1923) I.L.R. 45 A. 669.

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pointed out that the order is stamped as a decretal order under Art. 7 of Schedule I to the Court Fees Act, that section 96 of the Civil Procedure Code has no application here as that only gives the right of appeal from a decree but that section 105 applies. In reply Mr. Varadachari contends that the order of the learned Subordinate Judge by what it does was clearly a "decree" as defined in section 2 of the Civil Procedure Code because it conclusively determined the rights of parties with regard to the matters in controversy in the suit and was a final determination of such matters, and with that contention I entirely agree. The order of the learned Subordinate Judge just begins by reciting what the decree provided for, namely, the taking of the accounts, and states: "It is to give effect to this direction in the decree that an application was made to the Court by the plaintiffs to appoint a Commissioner. The Commissioner has now submitted his report. Objections have been filed to it on either side" and so on. He then gives his decision with regard to the Commissioner's findings. It is just as if the learned Subordinate Judge had treated the matter as one where a preliminary decree had been passed. He ends up by stating

> "There will, therefore, be a declaration to the effect that there is no amount due by the temple to any of the defendants and that on the other hand the 3rd defendant owes Rs 197-2-3 and the 1st defendant Rs 2,202-5-5 to it and a direction requiring the said defendants 1 and 3 to pay the temple trustees on behalf of the temple the sums respectively due by them as aforesaid with costs *subject to this decree* being liable be executed only upon the payment of the adequate Court-fee upon amounts decreed"

There was no mistake here and it is clear that the lea Subordinate Judge intended to finally dispose of the m between the parties and that his order was to be a "decree" the face of it, it was a decree and no one could possibly been misled. The mere fact that the learned Subordinate Judge's judgment is headed "Order" does not make his judgment any the less a judgment nor does the fact that the office chose to endorse upon the decree that it was a decretal order make any difference. The test to be applied is what it was and it completely satisfies the definition of a "decree" in the Civil Procedure Code. In my opinion paragraph 2 of the learned Subordinate Judge's order is conclusive of the matter and there can be no ground whatever for saying that he purported to act under a non-appealable procedure. This being so, the authorities referred to by the petitioner have no application whatever. It is probable that no Commissioner was appointed by the decree of the 30th November, 1923, because that was a compromise decree and that it was left to the parties to agree upon the

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Commissioner. Otherwise no doubt the decree would have directed the taking of the accounts by a named person and not left it to the parties to apply afterwards for the appointment of a Commissioner to take the accounts. The learned Counsel for the petitioner has asked the Court to be allowed to alter the petition into an appeal but I am not disposed to accede to that request as I think it is clear that the procedure of coming by way of a Civil Revision Petition has been adopted in order to save Court-fees.

This Civil Revision Petition must be dismissed with costs.

Pakenham Walsh, J.

Pakenham Walsh, J.—I agree and have nothing to add.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

M. Varadaiah Chetti and another .. *Appellants**
(Plaintiffs and Defendants).

v.

K. Narasimhulu Chetti and others .. *Respondents*
(Plaintiffs and Defendants.)

Varada Chetti v. Narasimh. Chetti.

Civil Procedure Code (V of 1908), S. 92—Suit for appointment of new trustees and for account—Compromise decree providing for election of new trustees subject to confirmation of Court—Further direction regarding delivery of temple property and payment of money by old to new trustees—Provisions if ultra vires*—Executability of decree—Power of executing Court to question validity of decree*

Certain worshippers of a temple filed a suit under S. 92, Civil Procedure Code, praying for the settlement of a scheme, the appointment of proper trustees and the taking of an account. Subsequently the suit was compromised and a decree was passed. The decree embodied a scheme by which two members of a particular community were to be elected trustees subject to confirmation by the Court. The decree contained a further direction regarding the taking of accounts and provided that the newly elected trustees should take possession of the temple and its properties only on payment to the old trustee of whatever sum might be found due to the latter. It also provided for payment by the defendants if any sum should be found due by them on the taking of accounts. On accounts being taken a certain amount was found due by the old trustee to the temple and the Court passed an order directing payment of this amount to the new trustees appointed under the scheme. On an application by the trustees to execute the decree,

Held, that the provision in the decree regarding the confirmation by Court of the appointment of the newly elected trustees was not *ultra vires*

Veeraraghavachariar v. *The Advocate-General of Madras*, (1927) I.L.R. 51 Mad 31: 53 M.L.J. 792 (F.B.), explained

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*A.A.O. No. 61 of 1926. 19th November, 1930.

Held, further, that the new trustees were entitled to execute the decree in respect of the direction for the delivery of trust property and the payment of money to the new trustees. In a suit under S. 92, Civil Procedure Code, the decree may direct the payment of money or delivery of property to the new trustees and in any event the validity of such directions in the decree cannot be questioned by the executing Court

Appeal against the order of the Court of the Subordinate Judge of Vellore, dated 22nd October, 1925, and made in E.P. No. 51 of 1925 in O.S. No. 14 of 1923.

S. Varadachariar and *S. V. Venugopalachari* for appellants.

A. C. Sampath Aiyangar and *T. R. Srinivasan* for respondents.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—The facts out of which this appeal arises have already been set out in the judgment in C.R.P. No. 1399 of 1925*. On the 19th July, 1925, the newly appointed trustees as petitioners sought to execute the decree of the Subordinate Judge referred to in C.R.P. No. 1399 of 1925 and they filed E.P. No. 51 of 1925. The respondents opposed that petition and raised a number of objections before the then Subordinate Judge of Vellore who dismissed the petition on the grounds that the newly appointed trustees the petitioners were not parties to the decree and had not been added as parties under O. 1, R. 10, Civil Procedure Code, that the right to execute the decree was not given to them, that they had not come under O. 22, R. 10, Civil Procedure Code and wer not transferees of the decree and further that the order th the Court was to approve of the appointment of the newly el ed trustees was *ultra vires* and also that the decree is a v tion of the provisions of the consent decree. The learned Su ordinate Judge further said that the trustees must come by a separate suit and have their claims as trustees recognised by the Court—this notwithstanding the fact that an application was made to the Court for the approval of the appointment of the newly elected trustees and the Court's approval was given. On behalf of the respondents it is pointed out that the plaintiffs in the suit first sought to execute the decree by an execution petition but that owing to the right of the plaintiffs to execute the decree being questioned in the office the petition was withdrawn and the present petitioners, the appellants here, substituted for the plaintiffs in this suit. This, it is argued on behalf of the respondents, is contrary to all practice and that the petitioners should have applied to have themselves brought on the

*Reported *supra*, p. 167.

Varadaiah Chetti v. Narasimhulu Chetti.

Beasley, C. J.

record as parties to the suit and that not having done so they cannot execute the decree nor can they be treated as assignees of the decree and continue the proceedings because the procedure provided for by O. 22, R. 10 has not been followed. (*Ratnam Pillai* v. *Annamalai Desikar*[1].)

Much reliance was placed upon the Full Bench decision in *Veeraraghavachariar* v. *The Advocate-General of Madras*[2] because it was argued that the provision in the scheme that after the new trustees had been elected their appointment was subject to the confirmation of the Court was *ultra vires*. The Full Bench, of which I was a member, held that if in a decree for a scheme framed under section 92, Civil Procedure Code, liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled such reservation of liberty in the decree will be *intra vires* if the assistance of the Court can be given without offending against section 92 of the Civil Procedure Code, but where liberty is given to apply to the Court for alteration or modification of the scheme such reservation is *ultra vires* as offending against that section. It is very strange to find that the respondents who were parties to the suit and the compromise decree and agreed to the scheme are now here contending that the provision is *ultra vires* and in my opinion they have not only shown themselves obstructive but have misapplied the Full Bench division. Dealing with this question Phillips, J., on page 44 says:

> "This principle, therefore, of reserving liberty to apply in temple suits appears to me to be based on wrong premises. It should only be done where the Court is unable, or for good reasons, thinks it advisable not to finally determine any question arising for its decision but to leave such decisions for a future date. Unless there is some ground of this sort, the decision must necessarily be final and therefore an order that such final decision can be altered by a mere application would seem to be *ultra vires*. I may observe here that the question put to us is a double question and the answer to the two parts of the question must be different. The first is 'Where liberty to apply is reserved . . . . . to ask for directions as to carrying out the scheme. . . . . . .' So far as this is concerned this may well be *intra vires* unless it contravenes the provisions of S. 92, Civil Procedure Code, for the assistance of the Court is asked merely to carry out what it has already ordered, and if such assistance can be given without contravening the provisions of S. 92, there can be no objection to such a rule being framed."

In the present case there was no alteration or modification of the scheme provided for. What was provided for was the carrying out of what had already been ordered, namely, the

1. (1923) 46 M.L.J. 341.
2. (1927) I.L.R. 51 M. 31: 53 M.L.J. 792 (F.B.).

appointment of new trustees. For greater caution it was provided that the election held was to be subject to the confirmation of the Court and there is no substance in the argument that such an order contravenes the provisions of section 92, Civil Procedure Code.

It is further argued that paragraph 2 of the consent decree directs that the amounts found to be owing by the defendants are to be payable to the plaintiffs and not to the newly elected trustees but that the order made in C.M.P. No. 107 of 1924 directs such sums to be paid to the trustees; and it is contended that this is a variation of the consent decree and that a consent decree cannot be varied except by consent. In support of this argument the Privy/Council decision in *Kinch* v. *Walcott*[3] is referred to. Here again this argument has no substance. Clause (2) of the decree speaks of what is due to the defendants from out of the temple funds and directs that what is due to or by any of the parties to the other the same is to be paid by whomsoever it is found payable to the other. This clearly means that the money found to be due by either the plaintiffs or the defendants is due from or to the temple and it certainly does not mean that the plaintiffs are themselves to pay moneys due by the temple to the defendants out of their own pockets, nor does it mean that the sums found due from the defendants are to go into the pockets of the plaintiffs. The decree clearly contemplates payment to and by the only perso[illegible] competent to deal with the temple funds, namely, its truste[illegible] Further, clause (3) provides that it is only on payment to [illegible] 1st defendant of whatever sum that may be found due b[illegible] Commissioner that the newly elected trustees can take poss[illegible] sion of the temple and its properties. Clauses (2) and (3) clearly have to be read together; and when clause (3) of the Order in C.M.P. No. 107 of 1924 is referred to, it is seen that the defendants are to pay sums of money to the temple trustees on behalf of the temple and that the trustees of the temple can execute the decree on behalf of the temple only on payment of the Court-fees on the amounts ordered to be paid by the 1st and the 3rd defendants to the said temple trustees. Obviously there has been no variation of the consent decree. As there has been in my view no variation of the consent decree (*Lachiram* v. *Jana Yesu Mang*[4] and *Gora Chand Haldar* v. *Prafulla Kumar Roy*[5]) have no application. Even the latter

3. (1929) 57 M.L.J. 429 (P.C.). 4. (1914) 27 I.C. 830.
5. (1925) I.L.R. 53 C. 166 (F.B.).

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case does not assist the respondents' argument, because there it was held that where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction and that within these narrow limits the executing Court is authorised to question the validity of a decree. But if, on the face of the decree, there is no want of jurisdiction, the executing Court cannot question the decree. Here the decree directs the trustees to execute the decree, and if no objection was raised when the final decree was passed that objection cannot be raised in execution. (*Zamindar of Ettiyapuram* v. *Chidambaram Chetty*[6], *Hari Govind* v. *Narsingrao Konherrao*[7] and *Kalipada Sarkar* v. *Hari Mohan Dalal*[8].) In *Lakshmibai* v. *Ravji*[9] the case in *Gora Chand Haldar* v. *Prafulla Kumar Roy*[5] was dissented from. It was there held that the executing Court has no jurisdiction to go into the question whether the Court which passed the decree committed any error in the exercise of its discretion. The decree in this case is perfectly clear. It directs the trustees to execute the decree on behalf of the temple and they are the persons in whose favour the decree has been passed; and the Order in C.M.P. No. 107 of 1924 was the only reasonable way of carrying out the consent decree. A ecree which directs the delivery of trust property to new trustees perfectly correct (*Jai Narain* v. *Bankey Lal*[10] and *Ghasaffar ain Khan* v. *Yawar Husain*.[11]) In the latter case at e 117 it is stated as follows:

"A suit instituted under section 539 is not a suit in which plaintiffs claim or can claim for themselves possession of the trust property. They merely ask the Court to vest the trust property in trustees duly appointed to manage the trust and to take it out of the hands of trustees who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power under the section to vest the trust property in the new trustees, and it seems to me reasonably clear that the Court may direct a trustee who is being removed from the trusteeship to make over the trust property to the new trustee or trustees"

It is clear that such a decree is an executable one and not merely declaratory. (*Balakrishna Chettiar* v. *Krishnamurthi Aiyar*.[12]) In *Miyaji* alias *Mahomed Ghouse Sahib* v. *Sheikh*

5 (1925) I.L.R. 53 C. 166 (F.B.)
6 (1920) I.L.R. 43 M 675 · 39 M.L.J. 203 (F.B.).
7. (1913) I.L.R. 38 B 194.
8. (1916) I.L.R. 44 C. 627.
9. (1928) 31 Bom L.R. 400.
10. (1919) 17 A.L.J. 957.
11. (1905) I.L.R. 28 A. 112.
12. (1926) 52 M.L.J. 182.

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Ahmed Sahib[13] it was held that it is competent to the Court in a suit under section 14 of the Religious Endowments Act to direct the removal of a trustee and to order a person competent to appoint a new trustee to make such appointment and to direct the trustee removed to surrender possession of property and pay any damages decreed to the new trustee to be appointed. In *Gnana Sambandha Pandara Sannadhi* v. *Kandaswami Thambiran*[14] it was held that if the power of appointment of a trustee is vested in any person, such person may be directed to make the appointment and possession may be delivered to him.

In my view, the order of the learned Subordinate Judge was clearly wrong and must be reversed and this appeal allowed with costs. The Lower Court will restore the petition to the file and dispose of it according to law.

Pakenham Walsh, J.

Pakenham Walsh, J.—I agree and have nothing to add.

B.V.V. *Appeal allowed.*

[The above decision was relied on and followed by another Division Bench of the Madras High Court (Reilly and Anantakrishna Aiyar, JJ.) in C.M.A. No. 193 of 1926, which was disposed of on 20th November, 1930.—Rep.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr Justice Reilly and Mr. Justice Anantakrishna Aiyar

Ganta Venkatasubbayya and another .. *Appellant*
(*Counter-Petitioners Nos.* 1 *and*

v.

Peeru Pacha Saheb and others .. *Respo*
(*Petitioner and Counter-Petitioners Nos.* 3

Appeal against the order of the Court of the Subordinate Judg Narsapur, dated 24th April, 1926 and made in E.A. No 1311 of 192 O.S. No. 41 of 1919, on the file of the Court of the Additional Subordinate Judge of Ellore.

Ch Raghava Rao and *B. T. M. Raghavacharlu* for appellants.

V. Suryanarayana for respondents.

The Court delivered the following

Judgment.—In A.A.O. No 61 of 1926 it was decided that a decree such as this could be executed against the removed trustees. So far as the appellants here (counter-petitioners 1 and 2) are representatives of defendant 2, one of the removed trustees, they cannot resist execution, and the appeal is dismissed with costs. So far as the appellant 1 claims also some right under defendant 2's sister, who was not a party to the suit, his remedy against the Subordinate Judge's order was by suit, not appeal.

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*C.M.A. No. 193 of 1926. 20th November, 1930.

13. (1908) I.L.R. 31 M. 212: 18 M.L.J. 205.

14. (1887) I.L.R. 10 M. 375.

P. C.

Prafulla Ranjan Das *v.* The Chief Justice and the Judges of the High Court of Judicature at Patna.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN AND SIR JOHN WALLIS.

Prafulla Ranjan Das .. *Appellant**

v.

The Chief Justice and the Judges of the High Court of Judicature at Patna .. *Respondents.*

Indian Bar Councils Act (XXXVIII of 1926), Ss. 8 and 14—Enrolment on Roll of Advocates—Statutory right to practise—Propriety of ex-Judge resuming position of advocate

A person whose name is properly enrolled on the Roll of Advocates maintained under section 8 (2) (*a*) of the Indian Bar Councils Act, 1926, has a statutory right to practise under section 14 of the Act.

Quaere, as to the propriety of an ex-Judge practising in the Courts of the Province where he has exercised judicial functions.

Order of the High Court, Patna, reversed

Appeal No. 77 of 1930 by special leave of His Majesty in Council against so much of the order of the High Court, Patna, dated the 29th March, 1930, as refused to allow the appellant, an advocate of the said High Court, to appear in the Courts of Bihar and Orissa.

The material facts of the case appear sufficiently fully from their Lordships' judgment.

Upjohn, K.C. (with *Parikh* and *Dube*) for appellant.—[Th]e order appealed against is in contravention of the appel[lant]'s statutory rights under the Indian Bar Councils Act and [th]e High Court had no power and jurisdiction to pass such order.

Dunne, K.C. (with *Wallach*) for respondents.—The High Court made the order in the exercise of their discretion.

[LORD ATKIN.—You have somehow to set aside the enrolment.]

It is a compound order; you cannot treat one part of the order as correct and the other as incorrect.

[LORD ATKIN.—It would be very remarkable that in India a man when he became a Judge ceased to be a barrister-at-law. It would be a very difficult position if we were driven to that conclusion.]

[LORD ATKIN.—It seems that the order putting the appellant on the Rolls stands.]

*P.C. Appeal No 77 of 1930. 2nd December, 1930.

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Prafulla Ranjan Das v. The Chief Justice and the Judges of the High Court of Judicature at Patna.

Upjohn, K.C., referred to section 19 of the Bar Councils Act and particularly to sub-section (2).

Before you can be on the Rolls, you have got to go through the formality of being *admitted.*

[SIR JOHN WALLIS.—Where does the Act provide for *admission?*]

The Bar Council adopted the then existing rules of the Patna High Court. The High Court have unfettered discretion to refuse admission to any person; *see* the proviso to section 9 (1).

[LORD RUSSELL.—The appellant claims to come in under section 8, sub-section (2) (*a*).]

The order made by the High Court is in a matter entirely within their discretion. They would never have enrolled him except upon condition that he was not to practise there. The High Court should have the power of refusal of enrolment. It may be that the conditional order of enrolment was wrong and may have to be set aside, but we submit that it ought not to be set aside without the cancellation of the *whole* order, dated the 29th March, 1930.

[LORD ATKIN.—It is a pure question of law, not of discretion.]

[LORD RUSSELL.—Are there any means of rectifying the Register?]

His name could be struck off.

Upjohn, K.C.—Only for misconduct.

The High Court may hold that his name was not prop on the Roll and may strike it off.

[LORD ATKIN.—They have no power, once they have put him on the Roll, to take it off.]

Once a man is *properly* on the Roll, you may not be able to take off his name except possibly for misconduct. But where the name is *improperly* on the Roll, the High Court may strike it off.

Although there is no cross-appeal, we are not precluded from submitting that the appellant was not entitled to be enrolled. On the true construction of the Rules, he was not entitled to be put on the Roll of Advocates. His enrolment under the particular sub-clause [section 8 (2) (*a*)] was wrong.

Upjohn, K.C., replied.

The appellant's name is on the Roll. Where is the power to alter the Roll, except under section 12, sub-section (7) for

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t misconduct? There is no jurisdiction in the High ter the Roll.

ATKIN.—If there was some plain mistake of fact, of which his name was put on the Roll, there must ent power in the Court to remove the name from

. to section 19 (2) and sections 10 to 13. We sub- order is severable, and our appeal is from that part ives the appellant of the right to practise. Learned r the respondents conceded before your Lordships vas no power to impose such condition on enrolment. urt has no right to impose the prohibition against

ber, 1930. Their Lordships' judgment was

Lord Atkin.

This is an appeal from so much of an order f Judicature at Patna as refused to allow ate to appear in the Courts of the province The appellant in 1905 was called to the onourable Society of the Middle Temple. tted as an advocate of the High Court at gal. On the establishment of the High caused his name to be removed from the the High Court in Calcutta, and was en- te of the High Court at Patna. He practised d in February, 1919, was appointed a Judge ourt. His name remained on the roll of advo- ebruary, 1930, he retired from his office as Judge l grounds, on a pension. Meantime, in 1926, had d the Indian Bar Councils Act, which provides that Court shall prepare and maintain a roll of advocates gh Court, and that no person shall be entitled as of actise in any High Court unless his name was entered oll. Immediately after his retirement the appellant the High Court to have his name entered on the roll tes It was at first refused, but on a renewed appli- which the appellant was represented by counsel the the 29th March made the following order:—

lthough in the opinion of a majority of the Judges Mr P. R ed to be enrolled as an advocate under section 8 (2) (*a*) of the Councils Act, yet in view of the fact that he was a Permanent his Court the Judges refuse to allow him to appear in the his Province."

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Lord Atkin.

On the 5th April the name of the appellant w on the roll of advocates, and on the same day the I issued to the appellant a formal certificate under certifying that Mr. P. R. Das, Barrister-at-Law, ha been enrolled as an advocate of this Court under sec (a) of the Indian Bar Councils Act, 1926.

In these circumstances the appellant contends entitled by statutory right to practise in the Courts vince under the provisions of the Indian Bar Councils By section 2 "Advocate means an advocate entered of Advocates of a High Court under the provisio Act." By section 14 "An advocate shall be entitled to practise (a) subject to the provisions of sub-s section 9" [which are irrelevant for this purpose] Court of which he is an Advocate." The appel edly entered on the roll of advocates; he is, tends an advocate who has the right given This reasoning appears to their Lordships

The only method of meeting the ar be suggested by counsel for the responden that the High Court was wrong in decid was entitled to be enrolled under section 8 By section 8, sub-section (2):—

"The High Court shall prepare and maintain the High Court in which shall be entered the name

(a) All persons who were as Advocates, Vaki as of right to practise in the High Court immediatel which this section comes into force in respect thereof,

(b) All other persons who have been admitted to High Court under this Act."

It was not suggested that the appellant came and the contention is that as immediately before the into force he was a Judge he was not a person who a was entitled as of right to practise in the High Co date. Their Lordships do not propose to pron opinion upon this contention, for in the present pro does not appear to be open to the respondents. The obviously raises questions of importance as to the p advocate and Judge in India, whether a Judge on ap ceases to hold the qualification of advocate, and if so all, on ceasing to be a Judge he may resume the posi advocate. The High Court at Patna resolved the favour of the appellant; their reasons are not before no cross-appeal is brought from this decision, and t ships in the circumstances feel bound to accept the en

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lished fact on the basis of which the rights of the aust be determined. No question arises in this case as ercise of any discretion by the High Court, for the relies upon, and in their Lordships' view has estab-tatutory right to practise. Their Lordships, therefore, om expressing any opinion upon the important ques-the propriety of an ex-Judge practising in the Courts ovince where he has exercised judicial functions. Their at the hearing intimated that they would humbly advise sty to set aside so much of the order of the 29th 30, as refused to allow the appellant to appear in the he Province, and that they would thereafter set out s as they have now done. There will be no order s of this appeal.

for appellant: *Watkins and Hunter.*

respondents: *Solicitor, India Office.*

Appeal allowed.

PRIVY COUNCIL.

the High Court of Judicature at Patna.]

RD ATKIN, LORD MACMILLAN AND SIR

P. C.

Nageshwar Bux Roy v. The Bengal Coal Co., Ltd.

Roy, represented by Charu rji .. *Appellant**

Coal Company, Limited and .. *Respondents.*

nt—Mineral rights—Conveyance of—Indian Limitation 08), Arts 142 and 144—Dispossession of plaintiff—Adverse amounting to—Trespasser—Constructive possession of mines—n of entire mineral field—What amounts to—Sinking of pits at places openly and without challenge.

e case of a grant of a village on Jamabrit tenure, nothing short ss words will convey the mineral rights therein

it for possession of immoveable property of which the plaintiff possession of the property has been dispossessed or has discon-ossession is governed by Art 142 and does not raise an issue of possession, but adverse possession for over twelve years, if made he defendant, may (as in the present case, it did) imply disposses-the plaintiff.

title founded by a trespasser on adverse possession will be strictly to that area of which he has been in actual possession. *Tantum tum quantum possessum* In the case of mines, there is no pre-i in law that the possession of a part of a seam infers possession vhole seam, much less of all the seams in the mineral field in which

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C. Appeal No. 101 of 1926. 24th November, 1930.
tna Appeal No. 29 of 1925.

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——
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part of a seam has been worked. On the other hand, p question of fact and the extent of the possession is an infe having regard to the nature of the subject and the possessic is susceptible. Minerals are inaccessible in the earth; it is i take actual physical possession of a whole mineral field. occupation must necessarily be partial until the whole mineral ed. This circumstance has to be borne in mind in determini of possession.

The respondent Coal Company was in possession of a vil of a lease, containing an express power to work the un This, their lessors had no right to confer, as it was concei lessors who, in their turn, claimed under a *sanad* granted b of the plaintiff, had only surface rights and no rights to the minerals. In a suit by the plaintiff for a declaration of h minerals and an injunction to restrain the defendants the coal, it was found that the village was treat of property and the minerals underlying it co fined unit. Rent was paid for the village as a who had been systematically carrying on the colliery wor sank three pits at different points and made bores in l in the village they chose, openly and without cha and actings were consistent only with the assert minerals under the whole village. In these circum the fact that the company may not have worked years was immaterial, if for twelve years, they operations in various parts of the field. Their statutory period was effective possession not on village but of the whole mineral field underlyin plaintiff. For such period, the plaintiff has been field and the suit brought in 1919 was, therefore, h

Glyn v. *Howell*, (1909) 1 Ch. 666, distinguishe Judgment of the High Court, Patna, affirmed.

Appeal No. 101 of 1926 from a decree o Patna, dated the 11th June, 1925, reversing Special Subordinate Judge at Daltongunj, da 1921, in favour of the appellant's father, Babu Roy, deceased (now represented by the appellan which he brought against the 1st respondent compan after called "the company") and others.

The plaintiff, who was the proprietor of the Bisram in the district of Palamau, claimed against the defend. claration of his title to the coal under the village of Rajh. estate, an injunction restraining the company from wc removing the coal, payment for coal already removed by pany and other incidental relief.

By a sanad, dated the 21st February, 1789, the pr in-title of the plaintiff granted certain tenancy rights ov Rajhara to Pande Shiva Ram and Pande Shankar Ra to the payment of an annual rent of Rs. 41. By a patta, dated the 7th July, 1855, some of the descendai said Pandes assigned their rights in the said Mauza in tion of an annual rent of Rs. 69 to the then secreta

P. C.

Nageshwar Bux Roy v. The Bengal Coal Co., Ltd.

The plaintiff relied in his plaint upon the said sanad and at by the terms thereof only the agricultural rights passed sees, and that no right to the minerals was granted By their written statement of defence the company, the principal respondents in the present appeal, claimed that by virtue of their sanad and patta, they and the endants were "the full proprietors of Mauza Rajhara ice and underground," the plaintiff being "only entitled nual quit rent of Rs. 41". They also pleaded adverse and that the plaintiff having "always treated and hese defendants as lawful and legal owners to the minerals d village," was estopped from denying their title thereto. e trial of the suit several issues were framed, of which llowing are material for purposes of the present report:

er the defendants have been in adverse possession of the ghts of Mauza Rajhara for more than 12 years?

the incidents of a Jamabrit tenure include minerals? If ndants full owners of Mauza Rajhara, including the

laintiff is the legal owner of the minerals of Mauza d is he entitled to the injunction as prayed for?

laintiff or his predecessors-in-interest have ever e defendants or their predecessors-in-interest as s of Mauza Rajhara, and whether his claim is acquiescence?

Judge held on issue 7 that the sanad passed rals, and this contention was not pressed by ny in the High Court. The learned Judge was no adverse possession and no estoppel, ecree in the plaintiff's favour and awarded him 96 as damages.

y the defendant-company to the High Court, Patna, ned Judges (Adami and Das, JJ.) agreed that no e minerals passed under the sanad of 1789, but they down to 1895 the plaintiff and his predecessors were s of the minerals, which belonged, first, to the Maharaja u, and then to the Government, who had by acquies- eited their rights to the defendant-company. They were pinion that if the plaintiff and his predecessors were the minerals prior to 1895, the company had acquired reto by adverse possession. They accordingly allowed l and dismissed the suit. The plaintiff thereupon pre- present appeal to His Majesty in Council.

hn, K.C., Raikes, K.C. and *Jardine* for appellant.

ne, K.C. and *D. MacNair* for respondents.

November, 1930. Their Lordships' judgment was by

Lord Macmillan.

MACMILLAN.—The subject-matter of dispute in this the right to the minerals and particularly the coal lying

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Nageshwar Bux Roy v. The Bengal Coal Co., Ltd.

Lord Macmillan.

under the village of Rajhara. The plaintiff, now the claims that these minerals belong to him in virtue o prietorship of the Bisrampur Estate, within which t of Rajhara lies, and in his plaint prays for a declarati effect.

It appears that by sanad, dated the 21st Febru an ancestor and predecessor-in-title of the plaintiff g village on Jamabrit tenure to Pande Shiva Ram a Shankar Ram. The successors of the latter in turn 1855 a mukarrari patta or lease of the village to the of the Bengal Coal Company, Limited, on behalf of pany with an express right to work the underlying c suit is directed against the Coal Company and t representatives of the grantees under the sanad o are also the representatives of the grantors of 1855 in the company's favour.

So far as the lease of 1855 is concerne title to the mineral rights in question depen the lessors to grant these rights. The sole consisted of the Jamabrit grant of 1789. that in the case of such a grant nothing sh will convey the mineral rights, and the sa no express grant of the minerals. It the mineral rights on the grantees, and this, ind been conceded by the defendants in the High that the grantors of the lease of 1855, havi title to the mineral rights in the village, were n them to the Bengal Coal Company. Both th Judge and on appeal the High Court of Judicatu have accordingly held that the defence fails, so far a on the lease of 1855 taken by itself—that lease, as r mineral rights, having been granted *a non dominis.* conclusion their Lordships agree.

But the defence contained a challenge of the ti plaintiff himself to the ownership of the minerals, attacked the plaintiff's title to sue for the declaration asked. The precise ground of this attack was not s the defendants' pleadings, but, despite the plaintiff' was developed in the course of the proceedings and was fully investigated both by the Subordinate Judge High Court. The former held that the attack failed latter held that it succeeded. As will appear, their do not find it necessary to examine this aspect of th need only mention that in the view of the High Cou

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ıeral rights in question was at least till 1895, and pro- l is, vested in the Government. Consequently when ıt appeal was partly opened before their Lordships on February, 1929, attention was drawn to the fact that ·nment was not a party to the case and was not repre- :hough important questions possibly affecting the title ɔvernment to minerals in India generally were raised. al was, therefore, directed to stand over in order that lence might be intimated to the Secretary of State for n reply to their Lordships' communication, the Secre- tate has intimated that the Government of India does ose to intervene in the appeal, and the case having n set down for hearing, their Lordships now proceed : of it.

ıt expressing any opinion as to the soundness of the taken by the High Court, their Lordships propose the plaintiff's title embraced the mineral rights consider what has become the main issue in before them, namely, whether the plea of npany that they have acquired a title to the Statute of Limitations is well founded. The y the Subordinate Judge but sustained as an of judgment by the High Court. It is plain tion of the Company is made out there is an

Indian Limitation Act (IX of 1908) it is pro- y suit for possession of immovable property of ntiff while in possession of the property has been or has discontinued possession shall be dismissed ted after a period of twelve years from the date of sion or discontinuance of possession (sections 3 and ıe First Schedule, No. 142). It is also provided that t for possession of immovable property or "any interest ot hereby otherwise specially provided for" if instituted eriod of twelve years from the time when the possession lefendant becomes adverse to the plaintiff shall be l (*Ibid.* No. 144).

Courts below appear to have treated the present case ; an issue of adverse possession under No. 144 rather dispossession under No. 142. In the result the n is here probably not material as adverse possession by ıdant may and in the present instance does imply dis- n of the plaintiff.[1]

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re the judgment originally continued as follows:—"Their Lord- ever, think it right to point out that the case in their view falls

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The present suit was instituted in 1919 and the ‹ therefore, is whether the defendant company have es› dispossession of the plaintiff for a period of twelve ye ceding 1919. They will have established this if they c that they have for such period been in possession to th sion of or adverse to the plaintiff.

"On the evidence," says Adami, J., "I find that the defen pany were in possession of Rajhara and were working the c raising coal to a greater or less degree all through the years 19 and that it is not proved that at any time in 1912 the work wa by a notice from the plaintiffs nor was the colliery abandone fore even if the plaintiffs had proprietary rights in the miner the period the defendants were in adverse possession for 12 would gain title."

The evidence as to the mining activities of the co Rajhara was subjected to a minute and critical exa Mr. Upjohn on behalf of the appellant. He e absence of records of continuous working fo of the three pits which were in existence in and finally maintained that, in any event, i that as regards one of the pits there had b sion for twelve years, the company thereby to the particular area of coal of which it wa possession for the requisite period and no mor was the small area worked by No. 3 pit. Su contended, could not be held to confer a righ under the whole village which comprised some

Now there is undoubted authority for the pr where a person without any colour of right wro possession as a trespasser of the property of another, which he may acquire by adverse possession will be limited to what he has actually so possessed. The *tantum prescriptum quantum possessum* is rigorously to him. And it has been held in the case of mines th is no presumption in law that the possession of a p seam infers possession of the whole seam, much less o seams in the mineral field in which part of a seam l worked. On the other hand, possession is a question and the extent of the possession may be an inference (*Low Moor Company* v. *Stanley Coal Compan* *McDonnell* v. *McKinty*[2] and see *Ashton* v. *Stock*.[3])

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to be decided under No. 142." The sentence was omitted in t judgment issued by the Board.

1. (1876) 34 L.T.N.S. 186. 2. (1847) 10 Ir. L.R
3. (1877) 6 Ch.D. 719.

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considering the character and effect of acts of posses- he case of a mineral field, it is necessary to bear in mind ıre of the subject and the possession of which it is ole. Owing to the inaccessibility of minerals in the : is not possible to take actual physical possession at a whole mineral field: it can be occupied only by ex- the minerals and until the whole minerals are ex- the physical occupation must necessarily be partial. question is what in fact has been possessed.

he present case the village of Rajhara has always been as a unit of property and the minerals underlying it e a defined unit as much as the surface overlying them. tence of coal under the village has long been known, as ting of the invalid lease of the minerals in 1855 to a any itself evidences, and workings have been inter- rried on in the area for a very long period. The ey map of 1865-66 shows two shafts in Rajhara. District Gazetteer systematic operations were ıpany at Rajhara in 1901, and although it systematic operations referred also to work- ıg colliery the Subordinate Judge is satisfied two pits in Rajhara itself. The workings nly described as a colliery, a comprehensive les both the worked and the as yet unworked a defined area. It was of the colliery in this ompany claim to have been in possession. The coal company have throughout, indeed, been con- ith the assertion of a right to the minerals under lage to which they thought they had right. They k at least three pits at different points, two of them lf a mile distant from the third. They selected the their own discretion, brought the requisite plant on to ıd and erected bungalows for their mining employees. ıs, who was resident assistant manager of the colliery ra from 1907-8 to 1913, himself made bores in the ıeld during his time. It is nothing to the purpose that pany may not have worked any one pit for twelve ntinuously if for twelve years they have car- operations in various parts of the mineral he fact that one pit in a mineral field is ıed and another opened in a different part of the field bores are sunk in likely places is excellent proof of pos- f the whole area. There was no concealment on the e company; they behaved openly as persons in posses-

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sion not of one pit, but of the mineral field underly village as a whole, and as entitled to sink pits anywl the village they chose. All this they did without any cl from the plaintiff or his predecessors, and in the *bona fid* that their lease entitled them to work the minerals anyw the area let.

The case of *Glyn* v. *Howell*[4] is distinguishable. the operations of the trespasser had been confined to a area of two acres and he had made no attempt to wo other part of the field. Here the operations of the c were only consistent with their being, as they concei possession of the whole minerals under the village as th in law in legitimate possession of the whole surfac plaintiff received rent from the company for the villa whole and the receipt of this rent from a company significant a name as the Bengal Coal Company, actually carrying on mining operations at various village, is indicative of recognition of their underlying minerals as well as of the surface

Their Lordships are not at all disposed weaken the principle that as a general rule wh ed on an adverse possession the title will be li of which actual possession has been enjoyed cation of this general rule must depend upon particular case and in the present instance th having regard to the whole circumstances and wi further the details of the evidence so closely an the High Court and again at their Lordships' ba selves in agreement with the view expressed by A the passage above quoted, and are of opinion that the p had by the company for a period of at least twelve year their occupation was effective possession not only of face of the village but of the whole mineral field ur it, and that for such period the plaintiff has been dis of the whole mineral field. Their Lordships will, t humbly advise His Majesty that the appeal be dismis costs.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *Sanderson, Lee & C*

K.J.R. *Appeal d*

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4 (1909) 1 Ch. 666.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Rao Bahadur A. T. Pannirselvam .. *Petitioner**

v.

A. Veeriah Vandayar and another .. *Respondents.*

Pannirselvam *v.* Veeriah Vandayar.

Madras Local Boards (Amendment) Act (Madras Act XI of 1930), *if retrospective—Transitional rules, Rr.* 5 (3) *and* 6 (1) (3)*—Scope of—Madras Local Boards Act (XIV of* 1920) *as amended, S.* 54 (2) *and proviso—Applicability to pending proceedings—S.* 57 (3)*—Effect of—Interpretation of statutes.*

The questions for consideration in this case were whether the provisions of the Madras Local Boards (Amendment) Act were retrospective and whether the Subordinate Judge before whom a petition contesting the election of the petitioner was pending at the time the Amending Act came into force had lost his jurisdiction to entertain the petition by virtue of the new proviso to S. 54 introduced by the Amending Act.

Held, (1) A statute other than one dealing with procedure shall not be construed so as to have retrospective effect unless the intention of the legislature that it should have such an effect appears in its terms or by clear and necessary implication.

(2) A declaratory Act or even a declaratory provision in an Act not in its general character declaratory, may have retrospective operation. But the Madras Local Boards (Amendment) Act is an amending, not a declaratory Act, and S. 54 of the Act, as re-enacted by the Act of 1930, changes the law in two respects. (*i*) An officer of Government, as defined by the Amending Act, is disqualified not merely for election but for holding office as member as well. (*ii*) The proviso lays down that not all salaried officers of the Government shall be excluded from election but only those who are whole-time servants of the Government.

(3) The second proviso to S. 54 refers to the future. It does not interfere with the procedure of a Court in a matter already pending before it.

(4) Rule 5 (3) of the transitional rules contained in the schedule to the Amending Act only makes any new remedy provided by the Amending Act available in pending proceedings. It does not say, nor can it be construed as laying down, that the old remedy available when the proceedings were instituted had gone. On the other hand, the context of that sub-rule indicates that it refers to applications or suits by or against a Local Board and not to litigation between individuals

(5) Rule 6 (1) (*c*) of the transitional rules which provides that the President and Vice-President of the Board holding office at the commencement of the Act shall hold office up to the date fixed by the Local Government implies they have been validly elected to the office, without any of the disqualifications which would make a person ineligible for election. It is not the object of the rule to bar an investigation of their disqualifications or condone their disqualifications, if any. Nor can a candidate be deemed to "hold office" within the meaning of the rule merely by reason of the provisions of S. 57 (3).

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*C.R.P. No. 1326 of 1930. 29th October, 1930.

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The jurisdiction of the Subordinate Judge was not therefore affected in any way by the Amending Act.

The question whether a Government Pleader and Public Prosecutor in the muffasal is a "salaried officer under Government" is a mixed question of fact and law with which the High Court will not ordinarily interfere.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Tanjore in O.P. No. 40 of 1930.

The Advocate-General, P. Venkataramana Rao and *R. Sundaralingam* for petitioner.

T. R. Venkatarama Sastri, K. P. Ramakrishna Aiyar and *N. Rajagopala Aiyangar* for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—The petitioner in this revision petition was elected President of the District Board of Tanjore in January last. His opponent at that election, the respondent here, put in an election petition in the Court of the Subordinate Judge of Tanjore early in February of this year Unfortunately for various reasons the disposal of that petition was delayed until the 4th of September last. The petitioner here has urged before us that by the 4th of September the Subordinate Judge had lost jurisdiction to deal with the petition in consequence of a new Act, which had come into force, Act XI of 1930. There is no dispute that at the time when the election petition was presented to the Subordinate Judge he had jurisdiction to dispose of it; nor is it suggested before us that he lost jurisdiction until the new Act came into force on the 26th August, 1930. The Subordinate Judge found that the election of Mr. Pannirselvam, the petitioner here, was void and ordered a re-election. That decision of the Subordinate Judge is contested before us for various reasons. But the reason which has occupied our attention and with which only I think it necessary to deal at any length is the allegation that at the time he disposed of the petition the Subordinate Judge had no jurisdiction to do so. For the election petitioner, Mr. Veeriah Vandayar, it is contended that, as admittedly the Subordinate Judge had jurisdiction to deal with the petition when it was presented to him, the new Act did not deprive him of jurisdiction.

The new Act amends in many particulars the Madras Local Boards Act of 1920, which was in force when this election took place and under the provisions of which Mr. Veeriah Vandayar

which does not involve both of the following incidents, namely that the incumbent (*a*) is a whole-time servant of the Government, and (*b*) is remunerated either by salary or fees."

It cannot be denied that that provision as re-enacted does clear up any doubts which might be felt and which had been felt as to whether a Public Prosecutor and Government Pleader could be elected as a member of a District Board. But it goes a good deal further than that, as has been pointed out by Mr. Venkatarama Sastri for the respondent here. It amends section 54 (2) of the old Act in two marked ways. The old section said that no salaried officer of Government shall be qualified for election as a member of a Local Board. The new section says that not only will no officer as interpreted by the proviso immediately following be qualified for election but no such officer will be qualified for holding office as a member of a Local Board. That is something far more than merely declaring the law. That is a plain amendment of the law. And when we go on to the proviso immediately following, under which certain persons who are officers of Government are not to be held officers of Government disqualified by this sub-section. we find instead of "salaried officers" of Government being mentioned whole-time servants of Government who are remunerated either by salary or fees are mentioned. That again makes a very distinct change in the law. Salaried officers of he Government were excluded from election by the old section ven though not whole-time servants of the Government. Such ficers are not now disqualified for election or for holding office as members of a Board, though they were disqualified for being elected before. When we examine the sub-section in that way and find that it makes two marked changes in the law, even though it may have cleared up doubts, and have been intended to clear up doubts, in respect to the eligibility of persons holding such offices as Government Pleaders and Public Prosecutors, we cannot treat it properly in my opinion as a declaratory provision. But of course, had it been a declaratory provision, that would not necessarily have affected the jurisdiction of the Subordinate Judge. It would have declared the law by which he had to decide the question before him; but it would not have taken away his jurisdiction. What is urged in that connection is that the Subordinate Judge lost his jurisdiction in consequence of the second proviso to section 54 (2) of the Act as amended, which runs:

"Provided further that, if any question arises either before or after an election whether any person is or is not disqualified under this sub-

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section, the question shall be referred to the Local Government, whose decision shall be final."

It is suggested that, when that provision came into force, the Subordinate Judge lost jurisdiction to decide the question which was properly before him in the election petition already instituted. Now to my mind the natural reading of that second proviso is not to that effect. Its words are: "If any question arises". That in itself is no indication of the past. The next words on which the learned Advocate-General laid stress were "either before or after an election". Those words, I do not think, help him because they are still in the natural construction of the sentence referring to future matters. "If any question arises before an election" that does not mean "has arisen in the past." "If any question arises after an election" neither does that refer to any question in the past. And it is of interest to notice that the whole of that sub-section (2) of section 54 in its new form is grammatically in the future tense, a matter which we cannot ignore when dealing with the contention that a particular provision, not explicitly retrospective, not described explicitly as declaratory, is yet to be construed as retrospective in its effect. The importance of that use of the future tense was pointed out in *Smithies* v. *National Association of Operative Plasterers*[4] in connection with the question whether a new provision should be applied to a pending action. To my mind we cannot find that anything in section 54 (2) as re-enacted by Act XI of 1930 i retrospective in its effect.

But there is another provision on which the learned Advocate-General strongly relied. There is a schedule at the end of Act XI of 1930 containing some rules, which are described as "transitional provisions," provided for certain matters until the amendments made by the new Act come into full force. One of those rules, R. 5 (3) runs:

"Any remedy by way of application, suit or appeal which is provided by the said Act (that is the Madras Local Boards Act, 1920) as amended by this Act shall be available in respect of proceedings under the said Act . pending on the date of the commencement of this Act, as if the proceedings in respect of which the remedy is sought had been instituted after the commencement of this Act."

The learned Advocate-General has contended that the effect of that rule is that the remedy open to the objector in

4 (1909) 1 K.B. 310

an election petition under the Act before the amendment is replaced by a new remedy under the Act and itself has disappeared. That is not what R. 5 (3) grammatically says. What it says is that any remedy by way of application, suit or appeal which is provided by the said Act as amended by this Act shall be available in pending proceedings. First, it is to be noticed that that rule disposes of the contention that the proceedings before the Subordinate Judge in the election petition were somehow guillotined by the new Act and came to a final end when the new Act came into force. But it must be borne in mind that it provides literally that any new remedy provided by the new Act shall be available in the pending proceedings. It does not say that the old remedy available when the proceedings were instituted has gone. We are asked to interpret it in that way. But surely that would be a most backhanded way of expressing such a result. Indeed I can hardly imagine that, if the Legislature really wished to bring all election petitions properly instituted under the Act before this amendment to an end, had they not been disposed of when the new Act came into force, that would have been stated in clear and simple language. It would be a strong course to cut short proceedings in such a petition, on which an aggrieved person had properly embarked, though no doubt it would have been within the competence of the Legislature to do that. But, if such a very unusual thing was to be done, surely we should expect it to be done in plain language, not by an implication in a rule such as this, an implication which cannot strictly be found in the language used. But I think that Mr. Venkatarama Sastri has really provided us with the right explanation of R. 5 (3) of these transitional provisions. He has pointed out that R. 5 has four sub-rules in it. The first provides that the property and rights used, enjoyed, possessed by, vested in, etc., a Board in existence under the old Act shall, when Act XI of 1930 comes into force, pass to the Board which takes its place. Sub-rule 2 provides that proceedings of the old Boards may be continued, so far as they are not inconsistent with the new Act, by the new Boards concerned. Sub-rule 3 then provides for remedies by way of application, suit or appeal provided by the old Act as amended by the new Act being available in pending proceedings Then comes sub-R. 4, which takes up each of the three previous sub-rules in turn and provides that, if any dispute arises as to the Local Board to which any property, right, interest or liability is to pass under sub-R. 1, or as to the Local Board by which any proceeding is to be continued under

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sub-R. 2 or as to the Local Board to or against which any remedy is to be available under sub-R. 3, then that question shall be referred to the Local Government, whose decision shall be final. When we take the whole of R. 5 together, including the provision in sub-R. 4 for deciding disputes on that point, I think it is clear that all these sub-rules refer to the Local Boards concerned and that sub-R. 3 refers to applications, suits or appeals by or against a Local Board and not to applications or litigation between individuals, such as election petitions, in which one person attacks the election of another person. If that is the correct view to take, then R. 5 (3) of the transitional provisions had no effect upon the jurisdiction of the Subordinate Judge.

But a modified contention was put forward by the learned Advocate-General in the course of his argument that, even if the Subordinate Judge's jurisdiction to deal with the election petition before him was not affected by the new Act, the second proviso to section 54 indicated a new procedure which he was bound to follow in deciding the question before him, the question whether Mr. Pannirselvam was disqualified for election. As I have pointed out, the second proviso to section 54 as re-enacted is that, if any question arises whether any person is or is not disqualified, the question shall be referred to the Local Government, whose decision shall be final. It is not disputed that a new provision in regard to procedure might well have retrospective effect so as to apply to pending litigation, and what is suggested is that the Subordinate Judge in this case, once Act XI of 1930 came into force, instead of trying to decide the question whether Mr. Pannirselvam was disqualified or not, should have referred it to the Local Government and, when he got the Local Government's ruling, should have disposed of the petition before him accordingly. It is interesting to notice that in the transitional provisions, to which I referred just now, certain questions as to which Board of the new Boards to come into being is to have any property or to continue proceedings or to have a remedy in suits and so on are to be referred to the Local Government, questions which without that provision might have to be decided by a Court; and there is no doubt that after Act XI of 1930 came into force a question about the disqualification of a person by reason of any office he held under the Government would have to be referred to the Government. But it is going a very considerable length to urge that that provision, the second proviso to section 54 (2) as re-enacted, was intended to apply to the procedure of Courts

dealing with election petitions already properly before them. No doubt the Legislature could have applied a new procedure to such inquiries. But to my mind if that had been their intention, something much more clearly stated would have been found in regard to the matter. It is not necessary to interpret the second proviso to section 54 (2) as re-enacted in that way; and without something far more clear I am not prepared to infer that the intention of the Legislature was to interfere with the procedure of a Court in a matter already pending before it, remembering that this Act XI of 1930 has nothing in its general scope to do with the procedure of Courts at all.

However, that is not the end of the argument for the petitioner here. It is urged that there are other provisions, other rules in the transitional provisions which oust the jurisdiction of the Subordinate Judge. R. 6 of those transitional provisions provides that, notwithstanding anything contained in the Madras Local Boards Act of 1920 or the amending Act, the members of every District Board or Taluk Board holding office at the date of the commencement of the amending Act shall be deemed to have been elected under that Act and their term of office shall extend to a date to be fixed by the Local Government not more than a year after the coming into force of the amending Act for the purpose of new elections to the new Boards. And in R. 6 (1) (*c*) it is provided that the President and the Vice-President of the District Board or the Taluk Board holding office at the commencement of the amending Act shall hold office as President or Vice-President, as the case may be, up to the date so fixed by the Local Government. It has been urged by the learned Advocate-General that the effect of that is that a President holding office at the date when the new Act came into force, that is, on the 26th August, 1930, will be entitled to remain in office until the date fixed by the Government, which, I believe, is the 25th August, 1931, however irregular may have been the method by which he has come to hold office, any election petition instituted against him under the old Act before the new Act came into force having no longer any effect. That is a surprising contention, and we should have to be very sure that the rules had that effect before we could accede to it. There are various reasons which under the old Act could be urged why an election was invalid, why a candidate for an election was disqualified. According to the learned Advocate-General's contention in this part of the case, however serious might be the disqualifications which might be urged against an elected President in an election petition pend-

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ing at the date when the new Act came into force, that is, on the 26th August, 1930, all those disqualifications would evaporate for the period until the date fixed by the Government, as it happens a year later, for the new elections. If he were discovered to be a deaf-mute or a leper, if he were discovered to have been an adjudicated insolvent, if he had any other of the disqualifications which might have been made the basis of an election petition against him, none of them would have any effect for the period until the new elections were to be held, that is, for the ensuing year. In connection with that argument it is interesting to observe that R. 6 (1) (*a*) of the transitional provisions makes the holding of office by members of Boards for the period until the date fixed by the Government for the new elections subject to the provisions of sections 54 (2), 56 and 59 of the Act. That is, the members holding office when the new Act came into force are to continue to hold office subject to those sections which provide for certain supervening disqualifications, many of them of the same nature as the disqualifications which would have made a man ineligible for election and might be the subject of an election petition; and the members are to hold office subject also to section 57, which provides for those disqualifications being decided by the District Judge. Similarly R. 6 (1) (*c*) provides that Presidents and Vice-Presidents of Boards are to continue to hold office until the date fixed by the Government for the elections subject to sections 15, 43 and 44, that is, subject to the provisions for their vacating office in certain events or for their removal by the Government in certain events or as the result of a vote of "no confidence". So it will be seen that members are not to hold office from the date on which the new Act comes into force until the date fixed by the Government for the new elections irrespective of any disqualification which may occur to them, nor are Presidents and Vice-Presidents to hold office irrespective of the ordinary provisions for their vacating office in certain circumstances or for their removal. Then why are we to jump to the conclusion that all questions of disqualification which might be raised in election petitions are to lapse, that a member or a President is to hold office however he might have been disqualified for getting into that office originally? The learned Subordinate Judge in dealing with this matter has come to the conclusion that in Rr. 6 (1) (*a*) and 6 (1) (*c*) "holding office" means validly holding office. That certainly gives a reasonable interpretation to those two rules. It has been urged by the learned Advocate-General

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that under the provisions in regard to election petitions when there is a petition pending against a member or a President, he is entitled to hold office until the petition is decided, and therefore Mr. Pannirselvam in this case was holding office at the date when Act XI of 1930 came into force because for various reasons this petition against his election had not been disposed of. But neither the new Act nor the old Act explicitly provides that members or Presidents against whom election petitions are pending shall hold office until the petitions are disposed of. On the contrary, if they are found to be disqualified in such petitions, the order which has to be made is that their elections are void. What the old Act provided by section 57 (3) was that "pending such decision the member shall be deemed to be qualified." What the Act as now amended provides is that "pending such decision the member shall be entitled to act as if he were not disqualified." That is a very different thing from providing that he holds office pending the decision; and in my opinion the learned Subordinate Judge was right in finding that at the date when Act XI of 1930 came into force Mr. Pannirselvam was not holding office as President of the District Board within the meaning of R. 6 (1) (*c*) of the transitional provisions of the new Act. That being so, we cannot find that he holds that office by virtue of those transitional provisions and is so immune, as has been contended, from the jurisdiction of the Subordinate Judge from the date when the new Act came into force. In my opinion all these contentions that the Subordinate Judge had no jurisdiction to dispose of the petition before him on the 4th September, 1930, fail.

It is also urged in the petition before us that apart from any question of jurisdiction the learned Subordinate Judge's decision that Mr. Pannirselvam was disqualified as a salaried officer under the Act before it was amended was wrong. Whether his decision on that point was right or wrong, it does not appear to me to be a question with which we need deal on this occasion. It is not a question properly coming before us in revision proceedings under section 115 of the Code of Civil Procedure. Whether he decided rightly or wrongly, if he had jurisdiction to decide the matter, then we cannot find that there was anything illegal or materially irregular in his decision. And in my opinion this is not a case in which we need fall back upon any reserve power of revision or superintendence which we have under any other enactment, because the question whether Mr. Pannirselvam was qualified or not under the

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Madras Local Boards Act before it was recently amended is not a question of any general public importance. From the date upon which the new Act came into force, 26th August, 1930, such a question in the particular form in which it was raised in this case cannot be raised any longer. Therefore, it appears to me quite unnecessary that we should go into it now.

In my opinion this Revision Petition should be dismissed with costs of respondent 1 (Advocate's fee Rs. 250).

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree.

The petitioner before us was elected President of the District Board of Tanjore, and on an election petition duly presented, the learned Subordinate Judge has declared his election to be void on the ground that as Government Pleader and Public Prosecutor, Tanjore, he held a salaried office under Government and was not eligible for election as President of the District Board under section 13 of the Madras Local Boards Act (XIV of 1920); and he has, therefore, presented this revision petition to us against that order. On his behalf the learned Advocate-General raised before us three contentions and Mr. P. Venkataramana Rao who followed him raised a fourth contention. The learned Advocate-General argued that, having regard to the provisions of the new Act XI of 1930, which became law while the proceedings were pending before the learned Subordinate Judge, the Court had lost its jurisdiction in respect of this matter and that guillotine had been applied by the Legislature to the petition pending in the Lower Court. It was argued that the petition and the proceedings before the Lower Court "dropped automatically" in the words of the learned Advocate-General. But at a later stage of the argument, the learned Advocate-General modified that position to some extent. As I understood him, he argued that though the petition might not have "dropped automatically" the proper procedure that the learned Subordinate Judge ought to have followed was to refer the particular point in dispute before him to the Local Government and to pass his final orders on the petition in accordance with the opinion of the Government thereon, and the learned Subordinate Judge not having done so, his order should be revised as one passed without jurisdiction, or, at any rate, as one passed with material irregularity. Thirdly, the learned Advocate-General argued that under R. 6 of the transitional provisions, the petitioner before us was holding office on the date of the commencement of the new Act, and, therefore, the other sub-rules of R. 6

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apply, with the result that he is secure in the holding of his office till 25th August, 1931. The fourth point that was argued by Mr. P. Venkataramana Rao who followed the Advocate-General on behalf of the petitioner was that the learned Subordinate Judge was not right in his finding that a Government Pleader and Public Prosecutor in the mufassal is a salaried officer under the Government and as such ineligible for election as President of the District Board.

To take the last point first: it is at the highest only a mixed question of fact and law whether a Government Pleader and Public Prosecutor in the mufassal is "a salaried officer under the Government." I proceed on the assumption that it is a mixed question of fact and law. From the records before us it appears that on this question the Government held different views on different occasions. We find from Ex. A that as early as 1887 the Government held the view that he was a salaried officer under the Government within the meaning of a similar provision under the District Municipalities Act. In Hammick's Municipal Manual published in 1905 I find a statement to the same effect (*see* page 29). A reference to Ex. III would show that subsequently the Government were advised that the amount paid to a Government Pleader and Public Prosecutor could be said to constitute "only retaining fee," but could not be said to be "salary" and consequently that the Government Pleader is not "a salaried officer" under the Government. Whichever might be the correct view, the finding arrived at by the learned Subordinate Judge is on a mixed question of fact and law. I am not sitting here in appeal against the learned Subordinate Judge's finding upon that question. The High Court's power of revision does not ordinarily extend to examine the correctness or sustainability of a finding of fact arrived at by the Lower Court, and I do not think that the case before me in any way constitutes an exception to the general practice of this Court. That being so, and having regard to the circumstance that such cases are not likely to arise in future —the policy of the new Act being in this respect quite different—I do not think that this is a case in which the High Court should enter into the examination of the correctness or otherwise of the finding on such a question. No special grounds are shown for us to interfere with such a finding. In this view, I overrule the fourth contention raised by the learned Advocate for the petitioner.

In order to understand and correctly decide the first three contentions raised by the learned Advocate-General, I think it

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is necessary to keep in view the general principles of legal interpretation of statutes, and also bear in mind the exact scope of, and limitations imposed on, the principle relating to construction of statutes regarding their retrospective operation. Though the general position could not be disputed, yet as I think that most of the contentions raised by the learned Advocate-General could be properly appreciated and answered if the rules of interpretation and its limitations be succinctly stated, I proceed to refer to the statement of the rule and its limitations as appears from decided cases and leading text-books. In Maxwell on Interpretation of Statutes at page 348 the rule is stated in these terms. Rules regarding procedure apart,

> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain."

Similarly in Statute Law by Craies at pages 324 and 326, there are similar statements of the rule. I do not propose to quote them *in extenso* but one paragraph at page 326 I should like to refer to here:

> "Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure unless the fact cannot be avoided without doing violence to the language of the enactment If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only"

In Halsbury's Laws of England, Vol. 27, page 159, it is stated:

> "A statute is *prima facie* prospective, and does not interfere with existing rights, unless it contains clear words to that effect, or unless, having regard to its object, it necessarily does so"

Further:

> "A statute is not to be construed to have a greater retrospective operation than its language renders necessary."

Now it is therefore necessary not only to see whether the wording of the new Act is clear on this point but also to examine how far it is clear and how far it necessitates retrospective application of the provisions of the new Act, because in

cases of doubt, or where a line is reached, where it is not at all clear whether the legislature intended to have particular provisions retrospective operation or not, the rule is clear that such new provisions should have prospective operation only. I do not really think that the correctness of these statements is really disputed, but I thought it proper to refer to these authorities only because it is necessary to keep in mind the exact scope and the limitations of the doctrine as laid down by learned authors.

Now the learned Advocate-General argued that section 54 as enacted by the new Act (XI of 1930) is a declaratory provision only, and, therefore, the presumption is that the new provisions were intended to have retrospective operation. In this connection it is necessary that I should refer to an observation made by the Privy Council in the case *Young* v. *Adams*,[5] because that observation, it seems to me, furnishes an answer to this contention of the learned Advocate-General. "It may be true," their Lordships remark,

"that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law"

They proceed further to lay down that the context of the statute and the terms of the clauses in question should be examined before even statutes which are declaratory in form are held to be retrospective. No doubt when it is clear from a declaratory statute that its object was to "explain" certain words or clauses used in a prior enactment, it would be easy to infer the intention of the legislature to be that the new Act should be retrospective. This High Court had to deal with such a question recently, when, for example, a question arose whether the meaning to be attached to the word "attested" occurring in the Transfer of Property Act was as explained in a later Act. The later Act—Act XXVII of 1926—was passed "to explain" certain provisions of the prior (main) Act. The Court had also to consider in another case what the effect of an amendment to section 53 of the Provincial Insolvency Act was when there was doubt regarding the meaning of a certain expression used in the main Act. In those circumstances this Court held in two recent Full Bench decisions that having regard to the scope and the avowed object of the declaratory Acts they should be taken in those cases to be *prima facie* retrospective. See *Veerappa Chettiar* v. *Subramania Aiyar*[6] and *Thaticherla Pichamma* v. *The*

5. (1898) A.C. 469 at 474

6 (1928) I.L R. 52 M 123: 55 M.L.J. 794 (F.B.).

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Official Receiver of Cuddapah[7]. Unless the intention be clear, either by express words used or by necessary intendment, I should not be justified in holding a new Act to be retrospective. The Privy Council in *Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner, Delhi*[8] made the following observations as to when statutes should be construed as retrospective. At page 290. this is what their Lordships say:

"While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

Now keeping in mind the exact scope of this principle, and also the limitations which have been laid down as attaching to the same, I proceed to examine the material sections to which our attention was drawn by the learned Advocate-General.

On the first question relating to section 54, I am not able to agree with the learned Advocate-General that what has been done under the new Act is only to "explain" the position of a person holding a "salaried office under the Government" as laid down by the prior Act. The legislature evidently took occasion to modify its policy relating to the whole matter. Under section 54 they have provided for a case where "a person is remunerated either by salaries or fees." They have also specially provided for other classes of officers of the Government, whole-timed and not whole-timed. They have also taken care to indicate that unless both these conditions are fulfilled in any particular case, viz., unless a person be both a whole-timed officer and also remunerated by salaries or fees, he could not be held disqualified under the new Act. Again the effect of such a disqualification has been extended to persons who after becoming a member, etc., become subsequently disqualified to hold the office. It is clear to my mind that the present is not a case where the statute could be said to be merely declaratory. The present case is, therefore, not governed by section 54 of the new Act, and the first contention must accordingly be overruled.

Again the learned Advocate-General argued that under R. 5, sub-rule (3) of the transitional provisions, the present is a case where the legislature has expressly provided that applications made while the old Act was in force should not be proceeded with; but that if any dispute arises, such as the one with

7. (1930) 59 M.L.J. 686 (F.B.)

8 (1927) L.R. 54 I A 421: I L R. 9 Lah. 284· 53 M.L J. 819 (P C).

which the learned Subordinate Judge was concerned, then the question has to be referred to the Local Government whose decision shall be final. It seems to me that R. 5 does not apply to the present case. Under the new Act the Government have taken power to change the areas and jurisdiction of Local Boards. They could extend the jurisdiction and area of one Taluk Board by adding new areas to the same, and they could cut up an old Taluk Board or take away some portion from it, as they think proper. The Government could also change the names of such Boards, etc. *See* sections 4 and 5 of the new Act. Questions will naturally arise in such cases as to which Local Board is to be the owner of property possessed by old Board, and as to which Board is to sue or be sued with reference to particular causes of action; questions would arise whether notices already issued preliminary to imposing taxes regarding persons or properties would be valid or not, and whether the new Boards would have to begin the whole process afresh. It seems to me that R. 5 of the transitional provisions only deals with cases similar to those I have suggested above. No doubt sub-R. (3) if it stood alone, and if it be wrested from its context, might lend some support to the contention. If the object was to enact a provision which would have the effect attributed to it by the petitioner, its present place between two sub-rules which refer to quite a different matter would be the most inappropriate place to locate such an important provision relating to the automatic dropping of an application filed in due course under the old law and pending before a Court when the new Act came into force. Sub-rule (4) refers to any dispute arising as to the Local Board by which any proceeding is to be continued under sub-rule (2), or to or against which any remedy is to be available under sub-rule (3) It is thus applicable to disputes to which the Local Board was a party—election petitions like the one in question are not covered by the said rule, the Board is not a party to such petitions. On the other hand, if we read all the four sub-rules together and in harmony with one another, the object of R. 3 is clear, and, in my opinion, that is the correct view that we should take. Even if I am wrong in my view as regards the exact scope of R. 5, sub-R. (3), the word "available" occurring in the rule would seem to indicate that a new remedy is provided for by it which may be taken advantage of by a person interested in the circumstances, but it does not follow that that is the only remedy open to him. Remedies may be given by a statute, and if a new remedy is given in a case where an old remedy existed, the ordinary presumption is that

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this new remedy is a cumulative one and not in lieu of the old remedy. It is a rule of construction that when a statute creates a new remedy in respect of a cause of action which existed under the common law, this new remedy is taken to be cumulative and not in substitution of the old remedy. If we take it that under sub-clause (3) a new remedy has been made available to a person in the position of the petitioner in the Lower Court, that does not, in this view, disable him from pursuing the old remedy, which he has already adopted, by way of moving the Court by a petition and which petition is pending before a Court. I would, however, prefer to base my judgment on the first of the two grounds mentioned by me. It therefore seems to me that sub-clause (3) of R. 5 of the transitional provisions is not capable of the construction put upon it by the learned Advocate-General on behalf of the petitioner.

The last point on which great stress was laid by the learned Advocate-General relates to the construction of R. 6 of the transitional provisions. The words "holding office" occurring in clause (*a*) of R. 6 were strongly relied on. It was argued that as the petitioner was "holding office" on the date when the new Act came into force, his term of office became secure, and that he was entitled to continue till 25th August, 1931, the date fixed by the Local Government. As I read the other sub-rules of R. 6, it seems to me that what is provided for by R. 6 is to extend the terms, and in some cases to shorten the terms, of the members, etc., referred to therein. One cannot speak of a person's term of office unless he validly holds that office. No doubt in one sense a person elected as a member, or elected as president, holds office (though his election is questioned) until the rights are finally adjudicated upon an election petition duly presented under the Act. But both the old Act and the new Act make it clear that the result of the adjudication so far as his office is concerned is to declare his election void, and under the present Act it is expressly enacted that "pending such decision the member shall be entitled to act as if he were not disqualified," section 50. In order to bring about as little dislocation as possible in the actual transaction of business by the Boards, the legislature has provided for the validation of those acts of such members and presidents which were done before adjudication by the Court on the validity of the elections concerned; but at the same time the legislature has also made it clear that when the legality of the election or appointment is decided against by the Court, the election is declared void. A trespasser who

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might be in possession of such an office on the date of the new Act could not be said "to hold office" within the meaning of the rule. Again, R. 6 adds a proviso "subject to the provisions of sections 54 (2) 56, 57 and 59 of the Act."

The result of the construction of R. 6 and its sub-rules contended for by the learned Advocate-General would be that having regard to the other provisions of this R. 6 allegations serious in the eye of the Legislature made against such candidates and pending adjudication in a Court are all condoned, so to speak, during this interim period, whereas if the same candidate be guilty of the same disqualification after the Act, proceedings could be taken against him in respect of the same. It is, therefore, difficult to accept the argument that what the Legislature has provided for in sub-R. 6 is to condone such disqualifications and make such persons duly elected members or presidents, irrespective of all allegations made against them, though they are pending investigation before the Court. I do not think it necessary to dilate upon this part of the case, as I agree with my learned brother's observations thereon. I overrule this contention also.

I must state that if the Legislature intended that the amended section 54 is to have retrospective operation, or that an election petition duly filed and being inquired into by Court should automatically drop, or that the jurisdiction which a Court admittedly had when proceedings were initiated before it should be taken away from it or otherwise curtailed or guillotine applied to such pending proceedings, one should have expected the Legislature to say so in express terms or at least by necessary intendment. I am not able to find any such reasonable indication in the new Act; and having regard to the well-settled principles applicable to such matters, I do not think that the above contentions urged on behalf of the petitioner before us should be accepted.

In my view, it could not be said that the learned Subordinate Judge has in this case either exercised a jurisdiction not vested in him by law or exceeded his jurisdiction in the matter. That being so, I agree that this revision petition should be dismissed with costs.

S.R. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Straits Settlements (Settlement of Penang).]

PRESENT:—VISCOUNT DUNEDIN, LORD TOMLIN AND LORD RUSSELL OF KILLOWEN.

The Official Assignee of the Estate of Cheah Soo Tuan .. *Appellant**

v.

Khoo Saw Cheow .. *Respondent.*

P. C. — The Official Assignee of the Estate of Cheah Soo Tuan *v.* Khoo Saw Cheow.

Straits Settlements Bankruptcy Ordinance, S 50†—Transfer of property by the insolvent within two years before adjudication—Onus of proof—Re-trial—Grounds for—Erroneous view of the law as to onus

S 50 of the Bankruptcy Ordinance in the Settlement of Penang runs as follows:

"Any settlement of property, not being . . . . a settlement made in favour of a purchaser . . in good faith and for valuable consideration, . . shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the Official Assignee."

On the admitted facts of the case, the insolvent had, within one year of his adjudication, transferred certain property to his wife for valuable, though inadequate, consideration It was held there was nothing either in the section or in the admitted facts to shift the burden of proof to the transferee.

An erroneous view as to the law in regard to onus, as a result of which the Trial Judge was disabled from evenly weighing the evidence, is a sufficient ground for a new trial.

Appeal No. 136 of 1929 from an order of the Court of Appeal of the Straits Settlements (Penang), dated 8th April, 1929, reversing an order of the Supreme Court and ordering a new trial.

D. N. Pritt, K.C. and *G. R. Mitchison* for appellant.

Respondent unrepresented.

29th July, 1930. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal by the Official Assignee of the Estate of Cheah Soo Tuan, a bankrupt, from an order of the Court of Appeal of the Straits Settlements (Settlement of Penang), dated the 8th April, 1929.

By the order of which the appellant complains the Court of Appeal set aside a judgment, dated the 17th July, 1928, of Mr. Justice Sproule and ordered a new trial.

Mr. Justice Sproule had declared that a conveyance, dated the 2nd June, 1926, by the bankrupt to his secondary wife, the respondent, of No. 121, Beach Street, Penang, was void as

*P.C. Appeal No 136 of 1929. 29th July, 1930.

†Cf S 55 of the Presidency Towns Insolvency Act (III of 1909) and S. 53 of the Provincial Insolvency Act (V of 1920).

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against the appellant and ought to be set aside, and ordered delivery up of such conveyance.

By section 50 of Ordinance No. 44 relating to Bankruptcy it is provided that—

"Any settlement of property, not being . . a settlement made in favour of a purchaser in good faith and for valuable consideration, . . shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the Official Assignee"

And also that—

"'Settlement' for the purposes of this section includes any conveyance or transfer of property "

The bankrupt was the sole proprietor of a "chop" or business called Guan Hup Hin. On the 10th June, 1927, the bankrupt was adjudicated bankrupt upon an act of bankruptcy, dated the 18th May, 1927.

Less than a year before the act of bankruptcy, namely, on the 2nd June, 1926, the bankrupt had conveyed a property belonging to him to his secondary wife, the respondent.

The property in question with an adjoining piece of land, had been purchased by the bankrupt in November, 1919, from Yap Chor Ee for $35,000, of which $30,000 was left on mortgage to Yap Chor Ee. Later the bankrupt sold the adjoining land for $10,000, which he paid to Yap Chor Ee, thus reducing the latter's mortgage to $20,000.

By the conveyance of the 2nd June, 1926, the property in question was conveyed to the respondent, subject to Yap Chor Ee's mortgage for $20,000. The consideration expressed to be paid was $5,000, and the conveyance contained a covenant by the respondent to pay all principal moneys secured by the mortgage and to keep the bankrupt indemnified against the same.

On the 24th August, 1927, the appellant moved the Supreme Court for an order setting aside the conveyance under section 50 of Ordinance No. 44.

At the trial certain facts were agreed, and the learned Judge then called on the respondent's counsel to begin, ruling that the onus of proof lay on the respondent.

In the course of the trial the depositions of the bankrupt on his public examination, and of the respondent upon her examination under section 31 of the Ordinance were "formally put in by consent."

The learned Judge reserved his judgment and delivered it on the 26th April, 1928. He stated that the respondent's counsel at the hearing accepted the burden of

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proof upon admitted facts. He outlined those admitted facts, which were in substance the facts to which reference has already been made. Upon the construction of section 50 of the Ordinance he held that the burden of proof was thrown upon the respondent. He further held that $25,000 was under-value, but he added that he could not find it was gross under-value.

At the end of his judgment the learned Judge said:

"Upon the whole I could not find that she" [*i e*, the respondent] "had proved that the conveyance to her of the property was genuine—I thought indeed that it was tainted with fraud intrinsically and apart from any question of the onus of proof"

He then declared the conveyance absolutely void.

Upon appeal by the respondent the Court of Appeal directed a new trial, holding that the Trial Judge had adopted a wrong construction of section 50 of the Ordinance with regard to the onus of proof, and had accordingly misdirected himself.

Mr. Justice Deane, who delivered the leading judgment, concluded his judgment in the following words:—

"For these reasons I have come to the conclusion that the learned Judge misdirected himself as to the onus, and that the result of the misdirection was very serious, since it coloured his whole outlook as to the facts and substantially prejudiced the appellant's" [meaning thereby the present respondent's] "chances It is true that the learned Judge, after stating that he could not find that she (the appellant) had proved that the conveyance of the property to her was genuine proceeded, 'I thought, indeed, that it was tainted with fraud intrinsically, and apart from the question of the onus of proof,' but putting aside the difficulty of understanding what is meant by saying that a conveyance is tainted with fraud 'intrinsically' when on the face of it there is nothing suspicious except that it is a conveyance by a husband to a wife, I do not think that a mere casual expression of this kind with nothing to support it can cure so serious a defect as there was in this trial In my opinion the judgment of the Lower Court should be set aside and a new hearing of the motion ordered In view of the fact that appellant's counsel in the Court below made no demur to the ruling that the onus was upon him, I think there should be no order as to the costs of this appeal, the costs of the first hearing of the Court below should abide the result of the new hearing."

Their Lordships are of opinion (1) that the Trial Judge was wrong in his construction of section 50 of the Ordinance; (2) that there was nothing in the admitted facts to shift the onus of proof to the respondent, and (3) that the respondent ought not to be precluded from objecting to the judgment, as the Judge's note shows that the respondent's counsel was called upon to begin as the result of the ruling given as to onus.

The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. Here, however, there was more. The Trial Judge had taken

an erroneous view as to the law in regard to onus. His mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence. Thus the respondent was placed at a disadvantage as the direct result of the Trial Judge's error.

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In their Lordships' judgment the order of the Court of Appeal was correct and the language of Mr. Justice Deane, which has been already quoted, adequately and accurately expressed the position and the conclusions which should follow from it.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellant: *Nisbet, Drew & Loughborough.*

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Chukkala Mangayyamma .. *Petitioner**

v.

Chukkala Appalaswami .. *Respondent.*

Mangayyamma v. Appalaswami.

Criminal Procedure Code (V of 1898), S 488 (3)—Compromise—Order based on—Enforcement.

An order passed by the Magistrate in terms of a compromise between the parties in the course of proceedings under this section can be enforced under sub-section (3).

Budhu Ram v. *Khem Devi*, A I.R. 1926 Lah. 469 and *Sham Singh* v. *Hakam Devi,* A.I R. 1930 Lah 524 dissented from

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Vizagapatam, dated 16th May, 1930 in Mis. Case No. 13 of 1927.

Kasturi Seshagiri Rao for petitioner.

K S. Jayarama Aiyar for respondent.

The Court made the following

ORDER.—The petitioner seeks to revise the order of the Sub-divisional Magistrate of Vizagapatam in an application under section 488, Criminal Procedure Code, by a wife for enforcement of the order of the maintenance which she had received from that Court. The learned Magistrate has refused to pass any such order for reasons which it is not easy to follow. He says that the original order is based on a compromise, that therefore section 488, Criminal Procedure Code, has no longer any application and that the proper remedy for the petitioner is

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*Cr. Rev Case No 533 of 1930 24th November, 1930.
Cr Rev Petition No 495 of 1930

Mangayyamma v. Appalaswami.

by way of Civil Courts. Of course if the parties had settled the dispute by themselves without any reference to the Court, there would have been no order under section 488, Criminal Procedure Code, at all; but such settlement is evidently not what they contemplated. The husband was prepared to consent to judgment without giving the petitioner any further trouble so long as her claim for maintenance was reasonable and therefore the Magistrate passed orders in the terms of this agreement or compromise, a very sensible arrangement which did not in any way detract from the force of the order. In two cases from Lahore, *Budhu Ram* v. *Khem Devi*[1] and *Sham Singh* v. *Hakam Devi*[2], it is held that a compromise cannot be enforced under section 488, Criminal Procedure Code, and if these cases refer to a compromise of which an essential part is the passing of an order under section 488, Criminal Procedure Code, I must respectfully differ from them. If the compromise is entirely independent of the Court, I agree that the Court would be under no necessity to pass an order under section 488, Criminal Procedure Code The view of the matter which I have endeavoured to set forth is I think succinctly put in *Rangammal, In re*[3] which is a ruling of a Bench of this Court and which finally settles the matter for this Presidency. The petition is accordingly allowed and the application is remanded to the Sub-divisional Magistrate for disposal according to law after hearing the parties, if necessary.

S.R. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Paredath Chori George .. *Appellant** (*Plaintiff*)

v.

Thithi Umma and others .. *Respondents* (*Defendants*).

Paredath Chori George v. Thithi Umma.

The Malabar Compensation for Tenants' Improvements Act (I of 1909)—Lessee of a vacant "kudiyiruppu"—Building a house on it—Agreement by the predecessor of the lessee not to claim compensation for improvements—Suit by the landlord for recovery of the site—Whether agreement is enforceable

Where a lessee of a vacant house site in Cochin town had built a house on the *kudiyiruppu*, and the landlord sued to recover it from him and claimed on an agreement with the predecessor of the lessee, that he was not liable to pay compensation for improvements made by the lessee,

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*C.M.A. No 228 of 1929 7th October, 1930

1 A I R 1926 Lah 469 2 A I R 1930 Lah 524.

3 (1902) 2 Weir 629, Cr Rev Case No. 41 of 1902

Paredath Chori George v. Thithi Umma.

Held, that the lessee was entitled to compensation in respect of the house, as the Malabar Compensation for Tenants' Improvements Act applies not only to agricultural tenancies but also to building leases

S A. No. 1532 of 1925 (unreported) followed.

Chathukutty v *Kunhappu*, (1927) I.L.R 50 M 813. 53 M L.J. 224 referred to

Appeal against the order of the District Court of South Malabar, dated 29th September, 1928 and made in Appeal Suit No. 48 of 1928, preferred against the decree of the Court of the Subordinate Judge of Cochin, dated 10th November, 1927 in Original Suit No. 54 of 1925.

B. Sitarama Rao for appellant.

N. A. Krishna Aiyar for respondent.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—In this case the plaintiff sued to recover what he called a "house site" in Cochin town from the defendants and prayed that the defendants might be ordered to pay the arrears of rent due and to demolish the house built on the land. The Subordinate Judge who tried the case made a decree for the plaintiff, rejecting defendant 6's claim that she was entitled to compensation for the house under the Malabar Compensation for Tenants' Improvements Act. The learned District Judge of South Malabar on appeal held that defendant 6 was entitled to compensation for the house and remanded the suit to the Subordinate Judge. This appeal is against the order of remand.

Ex. F is the lease counterpart executed by defendant 6's predecessor-in-title. It is dated the 29th October, 1911. It shows that he had been in possession under a previous lease for a short period and had built a house on the site. In Ex. F he agreed that, if he was required to surrender the property for any of certain reasons specified, including default in payment of rent, he was to demolish the house. It was contended for the defendant 6 that the Malabar Compensation for Tenants' Improvements Act applied to the case and therefore the agreement that the original lessee would demolish the house and not claim compensation for it was invalid. The learned District Judge found that what let by the plaintiff's predecessor to defendant 6's predecessor was a *kudiyiruppu*, in which he had built a house, and that the Act applied and therefore for that house defendant 6 was entitled to compensation.

It has been contended before us that what was let was the house. That is obviously incorrect because Ex. F makes it clear that the house was built by the lessee; the rent was made a charge upon the house as the lessee's, and the lessee was to

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Reilly, J.

demolish it. It cannot be suggested that the house was ever the landlord's or that it was a house that was let under Ex. F.

Then more reasonably it was contended that what was let was the actual area of land upon which the house stood and no more, that the land concerned was merely the site upon which the house stood. When we examine Ex. F and the schedule attached to it, it is clear, I think, that that is not correct. The boundaries given in the schedule show that something more than the land upon which the house actually stood was let. What was let was a compound or paramba or kudiyiruppu, within which the house had been built. Unfortunately the measurements of that compound are not given in the deed; but it is clear from the boundaries—a lane on one side, a lane on the other, two parambas on another side and a *neerthodu* on the remaining side—that the compound, of whatever size it is, includes something more than the actual area on which the house stands. Moreover, Ex. F refers to *araichas* in that area, which the tenant is to protect. That also shows that there must be some compound round the house. In my opinion the learned District Judge was right in finding that what was let to the tenant was a *kudiyiruppu* in which he had built a house.

The only question then is whether that is a case to which the Malabar Compensation for Tenants' Improvements Act applies. It has sometimes been contended that that Act applies only to agricultural holdings. That question was recently considered by a Bench of this Court in S.A. No. 1532 of 1925, and after an examination of the Act, the previous law and all the relevant cases it was decided that the Act applies not only to agricultural tenancies but also to building leases. That would cover the present case. Indeed it would more than cover the present case, in which it is not necessary to go so far. In *Chathukutty* v. *Kunhappu*[1] Jackson, J., expressed the opinion that the Act was confined to agricultural holdings and *kudiyiruppus*. The decision of the Bench in S.A. No. 1532 of 1925, though it goes further, agrees with Jackson, J.'s view that the Act applies to *kudiyiruppus*, about which, speaking for myself, I have never felt any doubt. That being so, in the present case it appears to me that the learned District Judge was right and that defendant 6 is entitled to compensation for this particular house.

I may add that I do not wish on this occasion to express any opinion whether a tenant, to whom a building is let, can

1. (1927) I.L.R. 50 M. 813: 53 M.L.J. 224.

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claim compensation for any improvements made to that building on the ground that the building itself must stand upon land and therefore he is a tenant of land within the meaning of the Act. That is a question into which it is unnecessary to go at present.

In my opinion this appeal should be dismissed with costs.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree.

The learned District Judge's finding is that the present is a case of a lease of vacant *kudiyiruppu* (house site) to the 6th defendant who built a house thereon, and that though in a subsequent renewal of the lease there was a provision that the 6th defendant would on ejectment demolish the building and restore the site to the plaintiff, the stipulation is not binding on the 6th defendant having regard to the provisions of the Malabar Compensation for Tenants' Improvements Act. Reading the document Ex. F as a whole, I agree with the learned District Judge that what was leased to the 6th defendant was not merely the actual site on which the house was built but the paramba within the four boundaries mentioned in Ex. F; and this is what usually happens in such cases, the tenant putting up a building in a portion of the paramba leased and making *kuikurs*, etc., in the other portion of his holding. (*See* Logan's Malabar Law, Vol. II, cxcix.) I am unable to accept the contention of the learned Advocate for the appellant that what was leased to the defendant was a building with only the actual site on which the building stands. The building admittedly belongs to the 6th defendant, and if the building belonged to the landlord there is no meaning in the provision that on ejectment the 6th defendant (tenant) would demolish the building (according to the assumption of the landlord's) and restore the paramba only to the landlord.

I proceed on the footing that what was leased was a paramba and that the building stands only on a portion of the property leased.

In *Chathukutty* v. *Kunhappu*[1] it was observed by Jackson, J., that the Malabar Act applied to improvements effected by lessees of the agricultural holdings and vacant *kudiyiruppus*. In *Sabju Sahib* v *Malabar District Board*[2] I had a case where the District Board of Malabar leased certain land forming roadside poramboke to a person under an express condition that he should quit the land without claiming any compensation for

1. (1927) I.L.R. 50 M. 813: 53 M.L.J. 224.
2. (1929) I.L.R. 53 M. 54: 57 M.L.J. 673.

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Ananta-krishna Aiyar, J.

improvements of any sort that might be effected by him thereon. I held that the roadside poramboke in question could not be said to be either agricultural land or *kudiyiruppu* site. I also held that a substantial building put upon the roadside poramboke by the defendant was inconsistent with the purpose for which the land was let. I accordingly held that the defendant was not entitled to claim any compensation under the Act in the circumstances. The decision of two learned Judges in Second Appeal No. 1445 of 1889 (unreported) was quoted before me, where the Court held that the lease of a dwelling-house within the limits of a town for purposes of residence only did not come under the Act of 1887. The case before me not being one of a lease of a dwelling-house but only of a vacant land (roadside poramboke), it was pressed upon me that the observations of the learned Judge in *Chathukutty* v. *Kunhappu*[1] relating to lease of vacant *kudiyiruppu* required reconsideration; but, having regard to what I understood to be the practice obtaining with reference to leases of vacant *kudiyiruppus*, viz., that the tenant in such cases ordinarily puts up a house on a portion of the paramba and make *kuikurs* on the other portions convenient for the purpose, thus converting the paramba into a sort of garden-house (garden with a house therein), I stated that absolutely no grounds had been made out why I should not follow the same. The question has been again raised before us whether the Act I of 1900 applies to leases other than leases for agricultural purposes. It is not necessary in this case to go into that larger question, since the present is a case of a lease of vacant *kudiyiruppu* as described already, and a bench of two learned Judges of this Court has very recently held in Second Appeal No. 1532 of 1925 that the Act applies to leases of vacant *kudiyiruppus*. The present is, if anything, a stronger case in favour of the tenant than the one before the learned Judges. The 6th defendant, a lessee of a vacant *kudiyiruppu* paramba has put up a house on a portion of the paramba included in his holding; he is entitled to compensation in respect thereof, as held by the learned District Judge. As I said already, it is not necessary in this case to say anything on the other question which was argued before us, whether a lessee of a dwelling-house in a town (the lease being unconnected with agriculture) would be entitled under Madras Act I of 1900 to claim compensation for improvements effected by him in respect of the building leased out to him.

1. (1927) I.L.R. 50 M. 813: 53 M.L.J. 224.

I agree that the Civil Miscellaneous Application should be dismissed with costs.

K.C. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Moovvara Kakkamvelli Lakshmi Amma .. *Appellant**
(*Respondent—Petitioner*)

v.

Thazhathitathil Krishna Kurup .. *Respondent*
(*Appellant—2nd Respondent*).

Lakshmi Amma v. Krishna Kurup.

Civil Procedure Code (V of 1908), S. 144—Suit for redemption—Decree directing possession of three out of four items of property—One of the plaintiffs claiming a fourth item also—Possession granted—Application for mesne profits due in respect of that item from the date of deposit of money to the date of possession—Whether allowable.

A decree directed that on payment by the plaintiffs into Court of a certain amount found to be due on a mortgage, the defendants should put the plaintiffs in possession of three out of four items of property. The plaintiffs paid the money into Court in accordance with the direction and obtained possession of the items. One of the plaintiffs, however, preferred an appeal to the Lower Appellate Court against that part of the Trial Court's decree, which disallowed her the other item claimed in the plaint. In the result the decree was modified in so far as the Appellate Court gave her the other item also. She filed an application to recover mesne profits due in respect of that item from the date on which money was deposited by her into Court up to the date on which possession was obtained. The Trial Court allowed the mesne profits on the footing of restitution under section 144 of the Civil Procedure Code, but the Lower Appellate Court reversed it.

Held, that as the plaintiff was not in possession of the property, in respect of which she claimed mesne profits at the date of the Trial Court's decree, S. 144 of the Civil Procedure Code could not be applied in her favour.

The word "restitution" which occurs in S. 144 would seem to imply that a party who applies under that section should prove that he was in possession of something the restitution or the restoration of which he seeks.

Appeal against the appellate order of the Subordinate Judge's Court of Tellicherry, dated the 29th day of March, 1928 and made in A.S. No. 122 of 1927 (A.S. No. 463 of 1927, District Court of North Malabar), preferred against the order of the Court of the District Munsif of Badagara, dated 12th July, 1927, and made in R.E.P. No. 1049 of 1926 (O.S. No. 205 of 1921—A.S. No. 326 of 1925).

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*A.A.A.O. No. 172 of 1928. 24th October, 1930

Lakshmi-Amma v. Krishna Kurup.

M. C. Sridharan for *V. P. Karunakaran Nambiar* for appellant.

P. Govinda Menon for respondent.

The Court delivered the following

JUDGMENT.—The appellant before me was the 3rd plaintiff in O.S. No. 205 of 1921 on the file of the District Munsif's Court of Badagara. The suit was for redemption of four items of properties on the footing of a mortgage. The plaintiffs got a decree in the Trial Court for redemption but only in respect of three of the four items mentioned by them in their plaint. The decree directed that on payment by the plaintiffs into Court of a particular amount found to be due on the mortgage, the defendants should put the plaintiffs in possession of the three items. The plaintiffs paid the money into Court in accordance with the directions contained in the decree and obtained possession of the items decreed to them by the Trial Court. The 3rd plaintiff however preferred an appeal to the Lower Appellate Court against that part of the Trial Court's decree which disallowed her the other item claimed in the plaint. The result of the appeal was that the Appellate Court modified the decree of the Trial Court by decreeing the other item also in favour of the 3rd plaintiff. The 3rd plaintiff (the decree-holder) having obtained possession of this extra item which she succeeded in getting a decree for in appeal, filed an application to recover mesne profits due in respect of this item from the date on which she deposited the money into Court to the date on which she obtained possession of that item. Her application was resisted by the 12th defendant, who was the only person interested in respect of this item. The Trial Court, however, held that the 3rd plaintiff was entitled to recover mesne profits as on the footing of restitution and accordingly directed the 12th defendant to pay mesne profits to the 3rd plaintiff for the period in question. The 12th defendant preferred an appeal. The learned Subordinate Judge of Tellicherry came to the conclusion that section 144, Civil Procedure Code, could not be applied to such a case as the present, and he accordingly reversed the Trial Court's order and disallowed the decree-holder's claim for the mesne profits in question. The 3rd plaintiff, the decree-holder, has accordingly preferred the present Civil Miscellaneous Second Appeal.

On her behalf it was contended by her learned Advocate that the case would substantially come under section 144, Civil Procedure Code. He argued that the Trial Court's decree was

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varied by the Appellate Court's decree and if the Trial Court had passed the decree which was ultimately passed by the Appellate Court, the 3rd plaintiff would have been in a position to obtain possession of this item and enjoy the mesne profits or income arising therefrom and that it was owing to the decree, erroneous in this respect, passed by the Trial Court that she has been deprived of possession of the mesne profits arising from this item. He also emphasised the words "or otherwise" occurring in section 144, Civil Procedure Code. He drew my attention to certain Privy Council cases, *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan*[1] and *Jai Berham* v. *Kedar Nath Marwari*[2], where the scope of section 144, or of section 583 in the prior Code, has been discussed, by the Privy Council. On behalf of the respondent it was argued that section 144 would apply only to cases where in execution of a decree passed by one Court a benefit is received by the decree-holder and thereafter that decree is reversed or set aside subsequently by a competent Court, and that in such cases the Court should place the parties in the position which they would have occupied but for such a decree which was varied or set aside. In the present case, the 3rd plaintiff was not in possession of this item at the date of the plaint or at the date of the Trial Court's decree. Her suit was to get possession of the same, among other items. That being so, it is rather difficult to apply that portion of section 144 which speaks of "placing the parties in the position which they would have occupied but for such a decree," to the case of the 3rd plaintiff. No doubt the words "who have been deprived by way of execution of any property or benefits" do not occur in section 144. But the word "restitution" which occurs in that section would seem to imply that a party who applies under section 144 should prove that he was in possession of something the restitution or restoration of which he seeks. As the plaintiff was not in possession of this property at the date of the Trial Court's decree, I feel it difficult to apply section 144 in her favour. As for the words "or otherwise" appearing in section 144 on which reliance was placed for the appellant, it seems to me that the appellant could not get any real assistance from those words either in the circumstances of this case. The words "or otherwise" are found in the Code of 1882 also. I have not been referred to any decision of any Court where these words have been the subject of

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1 (1887) L.R. 15 I.A. 12: I.L.R. 10 A. 166 (P.C.).
2 (1922) L.R. 49 I.A. 351: I.L.R. 2 Pat. 10: 44 M.L.J. 735 (P.C.).

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comment. Having regard to the word "restitution" which precedes immediately these words "or otherwise", it would appear that the words "or otherwise" were inserted to provide for cases where it is not possible to make restitution in the sense of restoring the very property that was lost to the petitioner and when the Court proceeds to do the next best thing that it could do in the petitioner's behalf in the circumstances. What "other" relief should be granted by the Court would depend upon the circumstances of each case. A familiar instance is where in execution of a decree, subsequently reversed, the property of the petitioner was sold in Court-auction, and purchased not by a party to the suit but by a third person. In such a case, it has been held that the ultimate successful party would not be entitled to restitution in the sense of getting back the very property that was sold in execution of the erroneous decree. In such cases it has been held that the aggrieved party would be entitled to the proceeds of the sale, as the equivalent into which the original property has been converted. It is probably to cover such cases that the words "or otherwise" have been inserted in the section. In any event, on the facts before me, it is clear that the appellant was not in possession of this property and that consequently the words of the section I have quoted could not apply to such a case.

Then it was argued by the learned Advocate for the appellant that this would be then a case where she has no remedy at all. That, however, is not the point for my consideration; I have now only to consider and decide the only point before me, whether she is entitled to restitution under section 144. It was pressed upon me that the justice of the case required that section 144 should be very liberally construed. I am anxious to help her to the extent to which I can legitimately go having regard to the wordings of section 144, Civil Procedure Code. It appears to me that in such cases, the appellant's counsel ought to have drawn attention to the fact when her appeal in the main suit was heard and decided by the Lower Appellate Court. If the attention of the Lower Appellate Court in the first appeal had been drawn to the fact that she had deposited the required amount into Court in proper time, and that she should accordingly be decreed mesne profits in respect of the item which was decreed to her by the Lower Appellate Court, then it is probable that the justice of the case would be considered by the Lower Appellate Court, and it would have, if it thought fit to do so, decreed her mesne profits also. The learned Advocate for the respondent drew my attention to two cases,

one reported in *Baikuntha Nath Chattoraj* v. *Prosannamoyi Debi*[3] and the other in *Bhimana Gowd* v. *Siddalingana Gowd.*[4] They support the contention urged on behalf of the respondent, but it is unnecessary to discuss those cases in detail as I think that the appellant's case does not come within the wordings of the section. I therefore have no alternative but to dismiss this Civil Miscellaneous Second Appeal with costs.

The appellant's learned advocate, however, requested me to allow the application made by her to be converted into a plaint and asked me to exercise the rights given to the Court by section 47, Civil Procedure Code. I think that the present is a case where I should grant her request. The petition filed by her will accordingly be treated as a plaint subject to her complying with the requisition that may be made by the first Court with reference to its form, and also Court-fee payable thereon. Of course I say nothing as regards the maintainability of the suit or the defence the other side may have with respect to the same. Those are matters that would have to be gone into after the plaint is registered and tried in the usual course.

K.C. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Seth Motilal and others .. *Appellants**

v.

Seth Nanhelal and another .. *Respondents.*

Central Provinces Tenancy Act (*XI of* 1898), *S.* 45—*Central Provinces Tenancy Act*, 1920, *S* 50—*Specific Relief Act*, 1877—*Civil Procedure Code*, 1908, *O* 21, *R* 32 (5)—*Agreement to transfer cultivating rights in* sir *lands—Specific performance of—Sanction of Revenue Officer.*

In an agreement by the defendant to transfer, *inter alia*, cultivating rights in *sir* lands, there is an implied covenant on his part to do all things necessary to effectuate such transfer, including an application by him to the Revenue Officer to sanction the transfer The Court has therefore jurisdiction to enforce specific performance of such agreement by requiring the defendant to make the requisite application for sanction to the Revenue Officer Provisions of the Central Provinces Tenancy Act,

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*P.C. Appeal No. 52 of 1929. 29th July, 1930.

3. (1923) I.L.R. 51 C. 324. 4. (1927) 27 L.W. 188.

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1898, S. 45, and the corresponding S. 50 of the Tenancy Act of 1920, considered and the Specific Relief Act, 1877, and the Civil Procedure Code, 1908, O. 21, R. 32 (5), relied on.

Appeal No. 52 of 1929 from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces, dated the 8th April, 1926, reversing a judgment and decree, dated the 30th September, 1924, of the Court of the District Judge of Hoshangabad.

The main question for determination in the present appeal was, whether the Appellate Court was right in decreeing specific performance of an agreement, dated the 4th September, 1914, and made between Mst. Jankibai (the plaintiff) and Seth Sobhagmal (1st defendant). The material facts of the case are sufficiently fully set out in their Lordships' judgment.

At the trial, several issues were framed, of which only the following are now material:—

1. Did defendant 1 under the terms of the karamama, Exhibit P-1, dated the 4th September, 1914, agree to reconvey the village to the plaintiff with cultivating rights in *sir* land, if so, can he be compelled to reconvey the village with cultivating rights to plaintiff, if so, for what sum?

4. Can this Court obtain sanction to transfer with cultivating rights in *sir* land?

8. If specific performance with or without cultivating rights in *sir* land cannot be enforced what damages can plaintiff claim?

On the 30th September, 1924, the District Judge delivered Judgment. He held that defendant 1 agreed to transfer the share in question with cultivating rights in the *sir* land but that agreement could not be enforced, as the Court had no power, having regard to the ruling in *Mansingh* v. *Rampiare*[1] to compel the defendant to apply for sanction to transfer those rights, and that the plaintiff could not, therefore, get specific performance of the contract, although she was entitled to it on payment of Rs. 41,100. The learned Judge assessed the damages at Rs. 24,900 but held that the plaintiff's suit was speculative and opposed to public policy, and her suit was, therefore, dismissed. The learned Judicial Commissioners, on plaintiff's appeal, held that the suit was not champertous; that the agreement in suit was specifically enforceable; that the Court had power to order defendant 1 to apply for sanction to transfer cultivating rights in *sir* land, as the conditions for granting sanction under section 50 (1) of the Central Provinces Tenancy Act, 1920, had been satisfied and the revenue authority could not refuse the sanction. They, therefore, held that the plaintiff was entitled to a decree for specific performance of the contract.

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1. (1910) 6 Nag. L.R. 185.

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The defendants preferred the present appeal to His Majesty in Council against the said decree of the Court of the Judicial Commissioners.

Dunne, K.C. and *Wallach* for appellants.

De Gruyther, K.C. and *Parikh* for respondents.

29th July, 1930. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, dated the 8th April, 1926, which reversed a decree of the District Judge of Hoshangabad, dated the 30th September, 1924, and decreed the plaintiff's suit with costs.

The appeal is brought by Seth Motilal, the son of Seth Sobhagmal, who was the 1st defendant in the suit, and who is now dead, and Seth Lachmandas and Seth Manakchand, the 2nd and 3rd defendants in the suit.

The respondents are the assignees of the plaintiff, Mst. Jankibai, widow of Govindram Chaudhari.

The plaintiff assigned all her interest in the subject-matter of the suit and in the decree appealed against to the respondents, whose names by order of the Court, dated the 7th October, 1927, were substituted for that of the plaintiff, as respondents in the appeal.

The material facts are as follows:—

On the 9th July, 1914, Mst. Jankibai, the plaintiff, had agreed to buy from Seth Jiwandas and the latter had agreed to sell to the former a four annas and four pies share of mauza Raisalpur, including *sir* and *khudkast* lands, with cultivating rights in the *sir*, for Rs. 46,100. Mst. Jankibai paid Rs. 5,000 as earnest money, but being unable to raise the balance of the purchase money, arranged with Seth Sobhagmal (defendant 1) that he should have the benefit of her contract with Jiwandas, pay the balance, take the sale-deed in his name, and convey to her the said share at any time within ten years on her paying him, (Sobhagmal) Rs. 41,100.

On the 25th August, 1914, Seth Sobhagmal accordingly took a sale-deed, from Jiwandas and paid him the balance of the purchase money. The full consideration for the sale was Rs. 46,100.

On the 4th September, 1914, two agreements were executed, one by Seth Sobhagmal in favour of Jankibai, and the

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other by the latter in his favour, stating the arrangement already mentioned.

On the 18th March, 1918, Seth Sobhagmal mortgaged a four anna share to the defendants 2 and 3.

On the 9th October, 1919, Jankibai gave notice to Sobhagmal that she was prepared to pay him the price, and called upon him to carry out his contract with her, but he took no notice of it.

Consequently the plaintiff instituted the present suit against Seth Sobhagmal and his mortgagees (the 2nd and 3rd defendants), praying for a decree that the defendants should be ordered to execute a sale-deed in favour of the plaintiff for the said share of the said village with cultivating rights in the *sir* land, after obtaining sanction under the Central Provinces Tenancy Act for the transfer of the *sir* lands on payment by her of the sum of Rs. 41,100 and other sums that might be due under the agreement.

The plaint contained other alternative reliefs, which it is not necessary to mention in detail at present.

At the trial many issues were raised; most of them are not now material. The learned District Judge dismissed the suit. He came to the conclusion that the litigation was speculative and opposed to public policy; that it had been engineered by Seth Nanhelal, the 1st respondent, to get the defendants out of the village, as they were undercutting him by lending grain and money at lower rates than he did in the village.

With regard to this ground, it is only necessary to say that it is not relied upon by the appellants in this appeal.

The plaintiff appealed to the Court of the Judicial Commissioner, which allowed the appeal, and on the 8th of April, 1926, made a decree in the plaintiff's favour as follows:—

"The decree of the Lower Court is set aside and it is ordered that the 1st defendant Sobhagmal shall apply within one month to a Revenue Officer for sanction to transfer to the plaintiff Jankibai the cultivating rights in the *sir* pertaining to the share in the village of Raisalpur mentioned in the agreement of the 4th of September, 1914, and further that within one month of receipt of that sanction he shall convey to the plaintiff the said share in accordance with the terms of that agreement, after redeeming the mortgage on the share held by the other defendants, Seth Lachmandas and Manakchand, and further that he shall pay the whole of the costs incurred by the plaintiff in both Courts by deduction from the amount to be paid to him for the transfer."

From this decree the appellants have appealed.

The first point urged on their behalf was that the agreements of the 4th September, 1914, between Mst. Jankibai and

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Sobhagmal did not cover the cultivating rights in the *sir* land, and therefore that the plaintiff was not entitled to call for a conveyance thereof from Sobhagmal.

This is a question of construction.

The agreement signed by Sobhagmal may be taken for consideration of this matter. It is as follows:—

"Deed of agreement executed in favour of Janki Chaudharan, widow of Govindram Chaudhari, caste Kurmi, of mauza Raisalpur, tahsil and district Hoshangabad, by Seth Sobhagmal, son of Seth Giyanmalji, caste Oswal, of Ichhawar, Bhopal State, to the following effect:—

'You agreed to purchase a four anna four pie share of mauza Raisalpur, tahsil and district Hoshangabad, for Rs. 46,100, from Rai Bahadur Seth Jivandassji, son of Raja Gokuldassji, of Jubbulpore, and paid Rs. 5,000 as earnest-money to the said Seth. But you could not arrange for the remaining amount and Seth Jivandassji would have recovered from you whatever damages there might have been, besides the earnest-money. So you gave up, of your own accord, the earnest-money and purchase rights in respect of the *mauza* and had the share of the village sold to me by Seth Jivandassji for Rs 41,100 (in words, forty-one thousand and one hundred rupees). But I agree with you as follows:—I will execute a sale-deed in your favour in respect of the entire four anna four pie share of this *mauza* with *sir* and *khudkast* at any time you pay in full, within ten years, Rs. 41,100 cash together with registration and other expenses of the sale-deed and rental arrears that may be due to me from tenants. If you fail to pay the full amount within the stipulated period and take a sale-deed, the deed of agreement shall be held to have been null and void and (you) shall have no right left to get a sale-deed executed If I fail to execute a sale-deed after the full amount as above is paid, you may pay the amount in Court and get a sale-deed executed by me through Court under this deed of agreement. So the deed of agreement is executed. It is true and may be of use when necessary. *Mitti Bhadi Sudi* 15, *Samvat* 1971, corresponding to 4th September, 1914. By the pen of Amritlal, Agent, Raisalpur.'"

It is to be noted that this agreement was made on the 4th of September, 1914, ten days after the deed by which Jiwandas sold the share in the village to Sobhagmal.

There is no doubt that by the last mentioned deed the cultivating rights in the *sir* land were transferred by Jiwandas to Sobhagmal, with the sanction of the Revenue Officer.

The recitals in the agreement of the 4th September, 1914, the price which Mst. Jankibai was to pay, viz., Rs. 41,100, which, added to the Rs. 5,000 earnest-money already paid by her, made up the total of Rs. 46,100, which corresponded to the purchase price of the sale-deed, and the operative words of the agreement go to show, in their Lordships' opinion, that the subject-matter of the agreements of the 4th September, 1914, between Mst. Jankibai and Sobhagmal was the same as the subject-matter of the sale-deed of the 25th August, 1914.

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As already stated, there is no doubt that by the said sale-deed the cultivating rights in the *sir* land were conveyed to Sobhagmal, and their Lordships are of opinion that the true construction of the agreements of the 4th of September, 1914, is that Sobhagmal agreed to transfer to Mst. Jankibai the cultivating rights in the *sir* land as well as the share in the village and the other matters specifically mentioned therein. It is to be noted that this opinion agrees with the construction placed upon the agreements by the learned District Judge, and that, so far as can be ascertained from the judgment of the Appellate Court in India, the above-mentioned construction was not disputed in that Court.

The next point on which the appellants relied was that a decree for specific performance of the agreements of the 4th September, 1914, should not be made, because such performance would necessitate an application by or on behalf of the defendants or one of them to the Revenue Officer for sanction to transfer the cultivating rights in the *sir* land, and that the Court had no jurisdiction to require the defendants or any one of them to make such an application.

The material section which was in force at the time of the agreements was section 45 (2) of the Central Provinces Tenancy Act (XI of 1898). That Act was repealed by the Central Provinces Act of 1920, and the corresponding section of the 1920 Act is section 50 (1), which is as follows:—

"If a proprietor desires to transfer the proprietary rights in any portion of his *sir* land without reservation of the right of occupancy specified in section 49, he may apply to a Revenue Officer and, if such Revenue Officer is satisfied that the transferor is not wholly or mainly an agriculturist, or that the property is self-acquired or has been acquired within the twenty years last preceding, he shall sanction the transfer."

In view of the above-mentioned construction of the agreements of the 4th September, 1914—viz., that Sobhagmal agreed to transfer the cultivating rights in the *sir* land—there was, in their Lordships' opinion, an implied covenant on his part to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer.

It is not necessary for their Lordships to decide whether in this case the application for sanction of transfer must succeed, but it is material to mention that no facts were brought to their Lordships' notice which would go to show that there was any reason why such sanction should not be granted.

In these circumstances their Lordships are of opinion that the Appellate Court had jurisdiction under the provisions of the

Specific Relief Act to make the decree against which the appeal is directed, and that the terms of O. 21, R. 32 (5), Civil Procedure Code, 1908, are sufficient to provide for the decree being carried out.

P. C.

Motilal v. Nanhelal.

Sir Lancelot Sanderson.

Inasmuch as their Lordships are of opinion that the decree for specific performance of the agreements was properly made, it is not necessary to consider or express any opinion upon the point raised on behalf of the appellants with regard to the question of damages.

For these reasons their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Stanley Johnson & Allen.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE EDDY.

Ramaswami Chettiar minor by next friend S.R.M.S.A. Annamalai Chettiar .. *Plaintiff**

v.

P.M.A. Vellayappa Chettiar and others .. *Defendants*

Roya Kanniappa Mudaliar and others .. *Applicants.*

Ramaswami Chettiar v. Vellayappa Chettiar.

Civil Procedure Code (V of 1908), O 1, R. 10 (2)—Hindu joint family—Suit for partition—Passing of preliminary decree and appointment of Commissioner to take accounts—Part of family funds claimed on behalf of temple—Addition of worshippers of temple as parties—Madras High Court Rules, Original Side, O. 31, R. 5—Scope

Where in a suit for partition among the members of a Hindu joint family the Court passed a preliminary decree and appointed a Commissioner to take an account of the assets and liabilities of the family and subsequently certain worshippers of a temple, who alleged that a sum of money in the hands of the family belonged to the temple, applied to be impleaded as parties to the suit,

Held, that the applicants should be impleaded as being proper parties within the meaning of O 1, R. 10 (2) of the Civil Procedure Code inasmuch as the Court could not ascertain the assets and liabilities of the family without deciding the question of the alleged trust fund The fact that there was no issue between the parties to the suit as originally framed on the question raised by the applicants was immaterial.

Vydianadayyan v *Sitaramayyan*, (1881) I.L.R. 5 Mad 52, In the matter of *Balusami Ayyar*, (1928) I.L.R. 51 Mad. 417: 55 M L J. 175 (F.B.) and *Esquimalt and Nanaimo Ry. Co* v. *Wilson*, (1920) A C 358, referred to

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*Application Nos 2842 of 1929 and 104 of 1930 in C.S. No 762 of 1926 — 17th January, 1930.

Ramaswami Chettiar v. Vellayappa Chettiar.

Quaere.—Whether R. 5 of O. 31 of the Madras High Court Original Side Rules entitles strangers to come in and make substantive applications to be impleaded as parties in a pending suit for partition among the members of a Hindu joint family.

T. M. Krishnaswami Aiyar and *S. Thyagaraja Aiyar* for applicants.

S. Duraiswami Aiyar and *T. V. Viswanatha Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—It is a tribute to the learned counsel who have appeared before me that my mind has fluctuated a good deal during the course of their arguments. Rightly or wrongly my mind is now stabilised. There are before me two applications. Both applications are made in a suit for partition entitled C.S. No. 762 of 1926 relating to a joint family known as the P.M.A. Firm. In that suit a preliminary decree was passed on the 22nd November, 1928. By that preliminary decree it was ordered and decreed that the suit be and thereby was referred to a Commissioner to take the following accounts:—

(*a*) an account of the property, credit and effects of the said joint family (inclusive of the assets, profits and liabilities of the said P.M.A. Firm belonging to the said joint family) as on the institution of the suit,

(*b*) an account of the debts and liabilities of the said family outstanding, and

(*c*) an account of all moneys of the joint family which have come into the hands of both or either of the defendants 1 and 3 herein not on the ground of wilful default, but in the ordinary course of management of the said family,

and to make an enquiry whether the compromise set up by the defendants 11 to 13 herein is true, valid and binding on the plaintiff or any members of the family herein.

The joint family referred to therein as the P.M.A. Firm is, I am told, one of the leading families of the class to which they belong. I am told that they took an active part in relation to the conduct of a Saivite temple at Elamayankottur. It is alleged that they were in possession of funds amounting to Rs. 1,38,000. It is alleged that that fund was a trust fund. It is alleged that the family itself regarded that money as the money of the deity. Those being the allegations an application taken out on the 17th September, 1929, was made to me asking for the following relief:—

"(*a*) Why the amount standing in the accounts of the P.M.A. Firm, Madras, to the credit of Sri Elamayankottur Deivanayagaswami should not be declared to be a trust fund payable by the Receivers of the estate Messrs Fraser and Ross, in full,

(*b*) Why the said Receivers should not be directed to retain out of the realisations made by them a sum sufficient to pay in full the said amount,

(*c*) Why costs of the application should not come out of the estate, and

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(d) Why such further or other order should not be passed as may be necessary in the interests of justice and in the circumstances of the case."

That application was made in this partition suit by two persons who were described as worshippers at the temple in question. When that application came before me I expressed some surprise that persons, strangers to the suit, should try to come in and make an application of this sort. I was told by Mr. T. M. Krishnaswami Aiyar, who appeared on behalf of the applicants, that he rested his application on O. 31, R. 5 of the Original Side Rules of this High Court. Rule 5 provides as follows:—

"If it appears to the Court that there are outstanding debts or liabilities of the family, and that the same cannot then be ascertained, the Court may direct an account to be taken thereof, and may, in its discretion, direct notice to be given to all persons having claims against the family, or its property by advertisement in the newspapers or otherwise, to bring their claims into Court before a fixed day"

O. 31 is dealing solely with partition suits. It was conceded before me that the right of the applicants to come under that rule depended upon whether or not the Court had directed notice to be given to all persons having claims against the family and whether in fact such notice had been given. I am told by Mr. Duraiswami Aiyar, who appeared on behalf of the respondents, that the Court did not direct notice to be given to all persons having claims against the family and that in truth no such notice had been given. That being so, it appears to me that the applicant cannot avail himself of that rule. I doubt very much whether the rule in any case would entitle strangers to come in and make substantive applications in such a suit as this. However it is unnecessary for me to decide that. It is sufficient for me to say that the rule itself not having been complied with the application fails and is dismissed. The respondents will have their costs of this application in any event, such costs to be taxed.

I now turn to the second application. Mr. Krishnaswami Aiyar feeling that he was in some difficulty and knowing the doubts I entertained with regard to his first application asked for leave to take out an application to make the applicants parties to the suit. That he did in the second application. The original applicants were the applicants in this also and a third applicant was added, who, I am told, is the manager of the temple. These three persons on the second application sought the following relief:—

(a) Why the applicants herein should not be added as party defendants in C. S. No. 762 of 1926, and

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(b) Why such further or other orders should not be made as may be necessary in the circumstances of the case and in the interests of justice.

Upon what does the second application depend? It depends as is admitted upon O. 1, R. 10 (2) of the Code of Civil Procedure. That rule provides as follows:—

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

Now the first matter I have to put to myself is this. What are the questions involved in this suit? I look at the preliminary decree and I see that a Commissioner has been appointed (a) to take an account of the property, credit and effects of the said joint family, (b) an account of the debts and liabilities of the said family outstanding.

There can be no question at all that if in truth this is a trust fund—and I do not propose to decide that one way or the other here—then this family is liable to account for it. If it had held these moneys in trust for various persons connected with this temple then that must be regarded as one of the liabilities of the family.

It has been argued by Mr. Duraiswami Aiyar on behalf of the respondents that the substantial question involved in this suit must relate to questions upon which the parties themselves are at issue. It is obvious that the members of this family are not at issue upon this question. It is not part of their case that this money is trust money. In fact it is their case and I have no doubt that they do say that this money belongs to their family. So says Mr. Duraiswami Aiyar, this is not a question involved in this suit. Let us see; is it not involved in this suit? Supposing the Commissioner finds this family is in possession of an amount in excess of Rs. 1,38,000. He is directed to ascertain what are the debts and liabilities of the family. Unless these persons (applicants) are before the Court it is admitted that in no sense would the Commissioner take cognizance of the allegations made in respect of this alleged trust fund. He would know nothing about it; he would regard all the moneys in the hands of the Receiver as being moneys of the family. He would regard those moneys as being available and completely available for distribution among the creditors. It may very well be that there is no issue between the parties. But is this

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a question entirely for them? O. 1, R. 10 (2) says that the Court may at any stage of the proceeding order that the name of any party improperly joined, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined, whether as plaintiff or as defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added. Why is the Court empowered to do that? It is empowered to do that in order to enable the Court "effectually and completely to adjudicate upon and settle all the questions in the suit". Now can the Court completely adjudicate upon and settle all the questions involved in this suit if it shuts its eyes to the persons who are making this application? Can the Court entirely disregard the allegation that one lakh and thirty-eight thousand rupees out of the moneys in the hands of the Receiver is trust money. Can the Court completely decide what are the debts and liabilities of the family if it wholly ignores this question of the alleged trust fund? It is said, rather it is contended before me, that if in fact it is held to be trust money there may be nothing for the creditors. That may very well be but if this is trust money and there are no other available assets then plainly the creditors are entitled to nothing. That is not an argument to sway my mind upon an issue such as this. I simply ask myself this question. Here are the rules framed giving the widest possible discretion to the Court. I have to ask myself can the Court completely settle all the questions involved in this suit without adding these persons as parties? In my opinion it cannot.

Now a number of authorities have been cited before me and I propose to refer to only a few. The question which I am now considering was considered by this Court in *Vydianadayyan* v. *Sitaramayyan*[1] by Sir Charles A. Turner, Chief Justice and Muthuswami Aiyar, J. In construing the words which I am called on to construe the Court in that case said:

"Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectually determined between the parties to the suit? or is it meant completely and effectually determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties? To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, 'between the parties to the suit' and there can be a few, if any, questions which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be

1 (1881) I.L.R. 5 M. 52.

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material, will, as between the parties to the suit, not be final. On the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them."

To the same effect is a judgment of Ramesam, J., In the matter of *Baluswami Ayyar*[2]. There referring to a partition suit such as this (that case being a case of insolvency) the learned Judge in the course of his judgment said that the Official Assignee can apply for all the creditors to be made parties so that the findings as to the nature of the debts may bind all.

To the same effect is a judgment of Mr. Justice Venkatasubba Rao in *Secretary of State* v *M. Murugesa Mudaliar*[3]. There dealing with the rule the learned Judge says:

"The first part deals with necessary parties and the second, with proper parties True, a decision is binding only on the parties to the suit; but does it follow that a Court is bound to decide a dispute in the absence of those persons whom it most vitally concerns?"

The learned Judge in the course of his judgment referred to a number of authorities and among them is a case *Esquimalt and Nanaimo Ry. Co.* v. *Wilson*[4]. That is a decision of the Privy Council. The headnote says this:

"When an action, if successful, will affect rights claimed by the Crown but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is a necessary and proper party and may be joined as a defendant by the plaintiff"

In the course of the judgment Lord Buckmaster says at page 363 with regard to the contention that there is no need to make the Attorney-General a party,

"With regard to the first of these contentions, their Lordships are clearly of opinion that the Attorney-General ought to be before the Court. It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease If these interests lay in a third party, he ought certainly to be added as defendant, and that is the best means of testing the necessity of the attendance of the Crown"

Mr. Duraiswami Aiyar sought to distinguish that case from this upon the footing that there some interest of the Crown was affected. Personally I fail to see the distinction between that case and this. In the case now before me is it not true to say that this Court has appointed a Commissioner to ascertain what are the debts and liabilities of this family. Is it not true to say that the interests of the present applicants who are saying

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2 (1928) I.L.R. 51 M 417: 55 M.L.J. 175 (F.B.)

3. A.I R. 1929 M. 443

4 (1920) A.C. 358

that a large portion of the available assets represent trust money are vitally concerned?

Mr. Duraiswami Aiyar drew my attention to a number of cases which he says point the other way. He directed my attention this morning to a case reported in *Naraini Kuar* v. *Piarey Lal*[5]. The headnote says this:

"Where an application is made under S. 32 (that corresponding to O. 1, R. 10 (2) of the present Civil Procedure Code) for the addition of a person whether as plaintiff or defendant, such person should, as a general rule, be added, only where there are questions directly arising out of and incidental to the original cause of action, in which such person has an identity or community of interest with the original plaintiff or defendant."

I look at the judgment of Mr. Justice Straight at page 741. There I read this:

"No doubt it is most desirable, when litigation has been instituted in respect of a particular subject-matter or specific contract, that the Court having cognizance of it should see that all questions directly springing out of it should be raised and dealt with once and for all, and that all persons naturally concerned in and likely to be legally affected by the determination of those questions should be joined as parties"

I do not want to deal with the particular facts of that case but I see nothing generally in the judgment of Mr Justice Straight which is inconsistent with the view I am now taking. I pause here and ask myself the question as to what is the alternative suggested. The alternative suggested here is that the present applicants should bring an independent suit. There is much to be said in favour of that suggestion and *prima facie* I should say that that is the right course. But supposing that they do in fact bring an independent suit. What would be the position? Two suits would be proceeding in this Court and in both of them this question would be involved as to what are the liabilities of this family. In suit No. 1, a decision would be reached without any reference whatever to the question of whether this money is trust money or not. In suit No. 2, a decision would be reached only solely with reference to this question. Is it not obvious that the effect of these two decisions would be that in all probability if the present applicants are right in their contention—they may be wrong, but if they are right—there would be two conflicting decisions.

Mr. Duraiswami Aiyar referred me also to certain English cases and among them is one reported in *Montgomery* v *Foy, Morgan & Co.*[6] There, a shipowner brought an action against certain consignees and an application was made that the shippers

5 (1880) I.L.R. 2 A. 738. 6 (1895) 2 Q.B. 321

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of the cargo should be added as defendants in the action in order that they might counter-claim against the plaintiff damages for short delivery and injury to cargo. The matter went up to the Court of Appeal and there Lord Esher said this:

"Here the matter before the Court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants and the company whom it is sought to add as defendants, and who were the defendants' principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials."

In these circumstances although there is much to be said both ways, the conclusion to which I have come is that this application falls within O. 1, R. 10 (2) of the Code of Civil Procedure by which the Court may at any stage of the proceedings add a party to the suit and I see no difficulty about that at all. I am told that the Commissioner will not report for about twelve months. Whether that be so or not I am satisfied that he ought not to report in this Court as to what are the debts and liabilities of this family without regard to the contentions put forward by the present applicants. I think their presence before the Court is necessary to enable the Court effectively and completely to adjudicate and settle all the questions involved in this suit.

In these circumstances I direct that these three applicants be added as party defendants in C.S. No. 762 of 1926 and that all proceedings therein be amended accordingly. I do not propose to put the applicants on any terms in making this order and they will have their costs of this application in any event such costs to be taxed. I direct that there be liberty to both sides to apply. I direct that the Receivers do retain in their hands the sum of rupees one lakh and thirty-eight thousand until further order.

B.V.V. *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

Ramaswami Chettiar, minor by next friend S.R.M.S.A. Annamalai Chettiar .. *Appellant**

v.

Roya Kanniappa Mudaliar and others .. *Respondents.*

Ramaswami Chettiar v. Kanniappa Mudaliar.

Letters Patent (Madras), cl 15—Judgment—Order under O 1, R 10 (2), Civil Procedure Code, 1908—Appealability.

An order under O. 1, R. 10 (2), Civil Procedure Code, passed by a single Judge on the Original Side of the High Court, impleading certain persons as parties to a pending suit is not a judgment within the meaning of cl 15 of the Letters Patent (Madras) and is consequently not appealable

Tuljaram Rao v *Alagappa Chettiar,* (1910) I.L.R. 35 Mad. 1: 21 M.L.J. 1 (F.B.) and *Official Assignee of Madras* v. *Ramalingappa,* (1925) I.L.R. 49 Mad. 539: 50 M.L.J. 361, relied on.

Maharaja of Pithapuram v. *Rama Rao,* (1927) I.L.R. 50 Mad. 770: 53 M L J. 329, considered.

On appeal from the order of the Honourable Mr. Justice Eddy, dated 17th January, 1930, and made in application No. 104 of 1930 in C.S. No. 762 of 1926 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

S. Duraiswami Aiyar, K. S. Rajagopala Aiyangar and *T. V. Viswanatha Aiyar* for appellant.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for respondents.

The Court delivered the following

Curgenven, J.

JUDGMENTS. *Curgenven, J.*—This is an appeal from an order passed by Eddy, J., in Application No. 104 of 1930† in C.S. No. 762 of 1926, adding the three applicants as party defendants to the suit. The plaintiff, a member of Nattukottai trading family, had sued the other members of his family for partition and an account of the assets and liabilities; and this application was made after a preliminary decree had been passed, the applicants, in their capacity as manager and worshippers respectively of a certain temple, applying to be added as parties to the suit upon the allegation that a sum of Rs. 1,38,000 of the alleged family assets was money to be held in trust for the benefit of the temple. Against the order of Eddy, J., granting the application the plaintiff appeals.

*O.S. Appeal No 35 of 1930. 6th August, 1930.

† The judgment of Eddy, J., is reported *supra*, p. 229.

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Curgenven, J.

The question is raised whether an appeal from an order of this kind lies, that is, whether the order amounts to a "judgment" within the meaning of clause 15 of the Letters Patent. An attempt has been made by the appellant to derive from the specific consequences of this order grounds in support of its appealability, but I think it is clear that we must look only to the general nature and effect of the order, and not to the results to which it may eventually lead. An order adding a party is either appealable as a judgment or it is not; and it cannot surely affect the question whether or not it results in the raising of new issues in the suit or indeed whether or not the Court had jurisdiction to pass it. There is no dispute that the order under reference is both in substance and in form an order under O. 1, R. 10 (2) of the Civil Procedure Code, and the point for decision is whether an order passed under this rule is appealable as a "judgment".

It is common ground before us that the construction placed upon the word "judgment" by Sir Arnold White, C.J., in the Full Bench case, *Tuljaram Rao* v. *Alagappa Chettiar*[1], should be adopted here, as indeed it has been adopted in all cases decided in this Court subsequent to that pronouncement. The passage embodying that construction has been often quoted, and it is unnecessary to set it forth again. We have to look to the effect, rather than to the form, of the adjudication. If its effect is to put an end to the suit or proceeding, it is a judgment. If it is in effect nothing more than a step towards a final adjudication, it is not a judgment within the meaning of the Letters Patent.

Judged by this test, I feel no difficulty in deciding that an order adding a party to a suit is not a judgment. It does not put an end to the suit, but is clearly a step towards a final adjudication. It settles no rights other than the right to be heard in the cause. Such an order answers, I think, to the tests proposed by Coutts Trotter, C.J., in *The Official Assignee of Madras* v. *Ramalingappa*[2], a case which related to an order virtually identical in type, namely, transposing certain defendants as plaintiffs. The effect of the order was no doubt to confer upon the newly transposed parties facilities for the prosecution of the suit, and to put them on the road to an adjudication which they could not have secured as defendants, but it

1 (1910) I.L.R. 35 M. 1: 21 M.L.J. 1 (F.B.).
2. (1925) I.L.R. 49 M. 539: 50 M.L.J. 361.

did not settle any substantive rights. The order in the present case is equally initiatory in character. I do not think that any useful purpose will be served by referring to other cases relating to orders less closely similar. They all endeavour to apply the criterion proposed by Arnold White, C.J. Our attention has been specially drawn to a case decided by Coutts Trotter, C.J., and Wallace, J., in *Maharaja of Pithapuram* v. *Rama Rao*[3], where it was held that an order granting leave to sue is a judgment if the effect of the order was that it finally shut out the defendant from pleading that the suit should have been dismissed on the point of jurisdiction. I do not deem it necessary to express either agreement with or dissent from this view, because while admittedly the conclusion is a specific deduction from the accepted principles of construction, it relates to an order of a clause not now before us. I do not think that it was intended to lay down the broad proposition that all decisions involving an assumption of jurisdiction by the Court, after contest, must necessarily be "judgments" though it may be that, conversely, the denial of jurisdiction, resulting as it must in the termination of the proceedings, does amount to a judgment.

Ramaswami Chettiar v. Kandappa Mudaliar.

Curgenven, J.

I am of opinion that no appeal lies against the learned Judge's order. The appeal is accordingly dismissed with costs. Vakils' fee allowed is Rs. 250.

Bhashyam Aiyangar, J.—I agree.

Bhashyam Aiyangar, J.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE KRISHNAN PANDALAI.

Peer Ammal and another .. *Appellants**
(*Defendants Nos.* 1 *and* 4)

v.

N. S. Nallusami Pillai and others .. *Respondents*
(*Plaintiff and Defendants Nos.* 2, 3 *and* 6 *to* 10).

Limitation Act (IX of 1908), Art 156—"Decree or order appealed from"—Ex parte *decree set aside by Trial Court and restored by High Court—Appeal by defendant—Limitation*

Peer Ammal v. Nallusami Pillai.

Where a preliminary mortgage-decree was passed *ex parte* and subsequently set aside by the Court which passed it within the appealable

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*S R. No 711 of 1930 19th November, 1930.
(Appeal No 532 of 1930)

3 (1927) I L.R. 50 M 770 53 M.L.J. 329

Peer Ammal v. Nallusami Pillai.

period and therefore no appeal was thereafter competent to the defendant but the High Court, in revision, restored the *ex parte* decree limitation runs only from the date of the order of the High Court reviving the *ex parte* decree and not from the date of the *ex parte* decree itself. "The language of the third column should be so interpreted as to carry out the intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party."

Muthu Korakkai Chetty v. *Madar Ammal*, (1919) I.L.R. 43 Mad 185: 38 M.L.J. 1 (F.B.) and *Mt Basso Kuar* v. *Lala Dhum Singh*, (1888) L R 15 I.A. 211: I.L.R. 11 All 47 (P.C.), referred to

S.R. No. 711 of 1930 since registered as Appeal No. 532 of 1930 sought to be preferred against the decree of the Court of the Subordinate Judge of Madura, dated 8th August, 1928 in O.S. No. 128 of 1926.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for appellants.

K. S. Jayarama Aiyar and *K. Swaminatha Aiyar* for respondents.

Krishnan Pandalai, J.

The Court (Krishnan Pandalai, J.) made the following

ORDER.—The question is whether this appeal was presented in time. The material dates are as follows:—

The appeal is from a preliminary decree on a mortgage passed *ex parte* by the Subordinate Judge of Madura in O.S. No. 128 of 1926 first on 8th August, 1928. The appellants (defendants 1 and 4) applied under O. 9, R. 13 on 9th August, 1928, to set aside the *ex parte* decree and the Court set it aside on 12th October, 1928. Meanwhile, the appellants had also on 9th August, 1928, applied for copies of the judgment and decree and they were ready for delivery on 27th September, 1928, so that, had the appellants wanted to appeal, they had out of the 90 days available about 1¼ months more after 12th October, 1928. As the decree was set aside by the Sub-Judge himself, no appeal was preferred. But the plaintiff (respondent) applied in C.R.P. No. 116 of 1929 to this Court to revise the order of the Sub-Judge setting aside the *ex parte* decree and this Court on 22nd November, 1929, set aside that order thus restoring the preliminary decree to effect. This appeal was presented on 6th January, 1930.

The provision of the Limitation Act applicable is Art. 156 which prescribes a period of 90 days from the date of the decree or order appealed from. The appellants contend that the date of this decree for the purpose of appeal must be taken as 22nd November, 1929, when this Court by its order in C.R.P. No. 116 of 1929 restored force and effect, including appealability, to the original decree which it had lost by its being set aside. The respondent contends that the date of the decree is 8th August,

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1928, the date when it was originally passed, and that its subsequent vicissitudes have no effect on the period of appealability and that the only course open to the appellants is to induce this Court to excuse the delay under section 5 of the Limitation Act. No application under section 5 being now before us, we have to decide between the two above contentions as to the starting point of limitation.

No decision exactly in point has been brought to our notice. But we entertain little doubt that the appellants' contention must be accepted. It is not only in consonance with the principle underlying the law of limitation that suits, appeals and other legal proceedings are possible only when there is some cause of action, or ground of appeal or other grievance on which the plaintiff, appellant or applicant has a right to come to Court and ask for relief, but the opposite view would lead to the absurd result that an appellant's right to appeal and the decree-holder's right to execute the decree are both barred before the decree to be appealed from or to be executed came into legal being.

In *Muthu Korakkai Chetty* v. *Madar Ammal*[1], a Bench of five Judges dealt with the question whether for an application for delivery of properties sold in Court auction, limitation ran from the date of an *ex parte* confirmation of the sale (26th April, 1913) or from the termination of proceedings taken by the opposite party to set aside that confirmation (25th June, 1915). It was held by four of the learned Judges that the latter date was the *terminus a quo* although the result of the proceedings in respect of the properties subsequently sought to be recovered was that the order of 26th April, 1913, was confirmed by that of 25th June, 1915. The other learned Judge contented himself with answering the question put in the negative as it was put in the form whether the cause of action for application was suspended during the pendency of the proceedings. The decisions of the Judicial Committee bearing on this question, an apparent conflict between which was the cause of the reference to a Full Bench, were so fully gone into in that case, that it is needless to refer at length to them again. To understand the ground of decision of the Court it is sufficient to refer to the citations from the Privy Council decisions in *Baijnath Sahai* v. *Ramgut Singh*[2] and *Basso Kuar* v. *Dhum Singh*[3]. In

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1 (1919) I.L.R. 43 M 185. 38 M L J. 1 (F.B.)
2 (1896) L.R. 23 I.A. 45: I.L.R. 23 C 775 (P.C.).
3 (1888) L.R. 15 I.A. 211: I.L.R. 11 A. 47 (P.C.).

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the former case which was one of a revenue sale by the Collector in 1882 confirmed by the Commissioner in 1884 and set aside by the Board of Revenue in 1884 and confirmed by the Board in review in 1886 their Lordships said that for the purpose of limitation there was no final or definitive confirmation of the sale till the final order on review by the Revenue Board in 1886. In *Basso Kuar* v. *Dhum Singh*[3] it was held that money due on an account stated which would, as such, have been barred in three years from the statement became for purposes of limitation a debt of a new character when, it having been retained by the debtor as part of the consideration for a proposed sale of land, that arrangement failed, the sale not being specifically enforceable and so declared by the decree between the parties. Their Lordships said as to the defence that the suit for the money should have been brought while the arrangement for setting it off against the purchase-money was still in force that:

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not And it would be a lamentable state of the law if it were found that a debtor, who for years had been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all."

Reading the judgments pronounced in *Muthu Korakkai Chetty* v. *Madar Ammal*[1], it becomes clear that while on the one hand no "suspension", in the proper sense, of a period of limitation which has begun to run is permissible except as provided in section 14 etc., of the Limitation Act, the Courts will place a liberal or in the language of Oldfield, J., an accurate construction on the somewhat loosely expressed words in column 3 of the first schedule which prescribe the starting point of the period of limitation by not requiring parties to start legal proceedings in circumstances when it would be futile for them to do so. As Seshagiri Aiyar, J., put it:

"Subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party" (p 213)

The respondent's advocate relied on *Ammathayi Ammal* v. *Sivarama Pillai*[4] and the Privy Council decision referred to

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1 (1919) I.L.R. 43 M 185 38 M.L.J. 1 (F.B.).
3 (1888) L.R. 15 I A. 211: I.L R. 11 A. 47 (P.C.).
4. (1924) 48 M.L.J. 74.

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in it, *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad*[5]. In that case the plaintiff had obtained a preliminary decree on a hypothecation under which the time for payment of the mortgage money was fixed for 6th March, 1917. Meanwhile, the mortgagor's (defendant's) husband brought a suit in 1916 against the mortgagor and mortgagee for a declaration that the mortgaged property belonged to himself and that the mortgage was therefore not binding on the property. That suit was decreed in the first Court in favour of the husband on 26th April, 1917, and by the first Appellate Court, but was dismissed in second appeal by the High Court on 28th April, 1920. The plaintiff applied for a final decree on 10th September, 1920, more than three years after the date fixed for payment but less than three years after the defendant's title to the mortgaged property was affirmed in the second appeal. The argument put forward for the plaintiff in this Court was that he had lost the right to apply for a final decree by the decisions of the first Court and the first Appellate Court in the husband's suit, that the property belonged to him and that it revived on the decision of the second appeal that it belonged to the mortgagor. The Court did not accept this on the ground that the Court when it sells property in execution of a mortgage decree does not guarantee the title of the judgment-debtor as against strangers and that Art. 181 which prescribes the starting point of limitation for such an application as the time when the right to apply accrues, does not say (mean) that the right to apply accrues only when the mortgagor's title as against strangers is clear. Therefore it was held that the right to apply for a final decree accrued on the date fixed for payment and that as no ground of suspension of limitation could be urged under the Limitation Act and no other ground of suspension was available according to *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad*[5], the application was barred.

This decision has in our opinion no application to this case. It merely decided that under Art. 181 the right to apply for a final decree in a mortgage suit accrues not when the disputes between the decree-holder and strangers to the decree about the title to the mortgaged property terminate and the mortgagor's title as against such strangers is established but from the date fixed in the decree for payment of the debt. In this case we have to deal with a different article, namely 156

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5. (1918) L.R. 46 I.A. 60: I.L.R. 46 C. 694: 36 M.L.J. 210 (P.C.).

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and the question is what is the meaning to be given to the words "date of the decree or order appealed from" when the decree has been set aside by the Court which passed it within the appealable period and, therefore, no appeal is thereafter competent to the defendant and the decree is afterwards restored by a higher tribunal. In our opinion the case clearly falls within the class of cases when a fresh starting point of limitation for appealing has necessarily to be found. The opposite view would lead to the absurd result, that the defendant would be deprived of the right of appeal because he did not appeal against a decree which had ceased to exist and against which, therefore, he could not have appealed after it was set aside. But it was suggested that he ought to have appealed before the decree was set aside under O. 9, R. 13. Assuming he had done so, as soon as the decree was set aside under O. 9, R. 13, the appeal would become infructuous and would necessarily have to be dropped and the position after the decree was restored in revision by the High Court would be the same as if he had not appealed at all. It is not to be supposed that the appeal should be kept pending in contemplation of the double uncertainty that the plaintiff might take the order setting aside the decree to the High Court in revision and that this Court might interfere in revision. If we look at the matter from the point of view of the decree-holder, it becomes still more absurd if we have to suppose that his right to execute the decree under Art. 182 is in the circumstances of the present case to begin from the date of the first decree which was subsequently set aside and later restored. If between the date of the original decree and the restoration in revision a period of more than three years has expired, it would follow that as there is no allowance for the intervening period according to the Act or any other clauses of Art. 182, his application for execution would be barred before he succeeded in getting his decree restored. A construction which leads to such results could not have been contemplated by the Legislature. We think, therefore, that the date of the decree appealed from must be taken as the date when the decree was restored in revision by this Court. On this footing, we hold that the appeal was presented in time and it will be admitted.

S.R. *Appeal admitted.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD MACMILLAN AND SIR JOHN WALLIS.

Sir Charu Chandra Ghose .. *Appellant**

v.

Kumar Kamakhya Narain Singh and others .. *Respondents.*

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Sir Charu Chandra Ghose *v.* Kumar Kamakhya Narain Singh.

Chota Nagpur Tenancy Act (VI of 1908), S. 84 (3)—Entry in record-of-rights—Onus of proving incorrectness—Civil Procedure Code, 1908, S. 11, Expln IV—Omission to sue for declaration, effect of—Jagodih estate, whether a shikmi taluk or a jagir of the Ramgarh Raj—Malguzari and jama, when construed as rent or revenue

An entry under S 84 of the Chota Nagpur Tenancy Act is presumed to be correct until the contrary is proved

On the evidence, it was held that the plaintiff, the Zemindar of Ramgarh, had failed to discharge the statutory burden of proving that the entry in the "Khewat" or record-of-rights, recording the Jagodih estate as a shamilat or shikmi taluk of the Ramgarh estate, was incorrect, and that the Jagodih estate was non-resumable and not an ordinary jagir tenure held under the Raja.

Failure to sue for a declaration in no way bars a claim for substantive relief when it arises Expln IV to S 11, Civil Procedure Code, 1908, referred to.

Where there is a controversy as to the meaning of such words as hukmi malguzari, jama and the like, which may mean rent or revenue, it is desirable that the word used in the vernacular should be inserted in brackets after the English rendering, so as to assist the Court in determining which meaning is applicable in the particular case.

Judgment of the High Court, Patna, reversed.

Appeal No. 92 of 1927 against the decree of the High Court, Patna, dated the 11th March, 1926, which reversed the decree of the Additional Subordinate Judge of Hazaribagh, dated the 18th April, 1922.

The material facts of the case are sufficiently fully stated in their Lordships' judgment.

De Gruyther, K.C., Dunne, K.C. and *Dube* for appellant

Upjohn, K.C., Wallach and *Pugh* for respondents.

21st October, 1930. Their Lordships' judgment was delivered by

Sir John Wallis

SIR JOHN WALLIS.—This is an appeal from a decree of the High Court at Patna reversing the decree of the Additional Subordinate Judge of Hazaribagh and decreeing the suit brought by the Court of Wards on behalf of the minor zemindar of Ramgarh for a declaration that the suit villages forming the

*P.C. Appeal No. 92 of 1927 21st October, 1930.
Patna Appeal No. 22 of 1926

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Sir Chaitanya Chandra Ghose v. Kumar Kamakhya Narain Singh.

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Jagodih estate are an ordinary jagir of the Raj resumable on failure of the direct male line of the grantee, and are not a shamilat or shikmi taluk of the Ramgarh estate as recorded in the "Khewat" or record-of-rights of the zemindari made by the Settlement Officer under the provisions of the Chota Nagpur Tenancy Act, 1908.

The adjoining Perganas of Chai and Champa, one to the north and the other to the south of the Barrakur river, form part of the Ramgarh Zemindari in the Hazaribagh district of Chota Nagpur. The Jagodih estate is situated in Chai, and is one of several estates in these Perganas which were recorded in the settlement as shamilat taluks—that is to say, taluks in which the talukdars or proprietors now pay the Government revenue to the zemindar instead of paying it directly to Government. Although this dependence is strictly limited, these estates have also acquired the name of shikmi or belly taluks, as being now in the maw of the zemindar, who has sometimes been tempted to claim them as portions of his own estate held on jagir tenure and resumable in certain events. In recent years the question has assumed increased importance as affecting the ownership of minerals.

In this, as in the *Barsote* case, *Surendra Nath Karan Deo v. Kumar Kamakhya Narain Singh*, not reported at present*, the Raja of Ramgarh is seeking to establish that this estate is held under him on jagir tenure. In the *Barsote* case the Board, agreeing with the Subordinate Judge, allowed the defendants' appeal and dismissed the suit on the ground that as no suit had been brought in the Revenue Court to rectify the entry in the khewat, that entry under section 84 of the Chota Nagpur Tenancy Act was to be presumed to be correct until it was proved to be incorrect, and the plaintiff had failed to discharge the onus imposed upon him. In this case also the plaintiff is subject to the same onus, and the question before their Lordships is whether the Appellate Court was right in holding on the evidence before them that he had satisfactorily discharged it.

It is alleged in the plaint that Maharaja Bishun Singh, the proprietor of the Ramgarh Raj, which comprises several perganas including Pergana Chai, granted certain villages, including the suit villages, in jagir to Raja Lall Khan, the predecessor-in-interests of defendants 1 and 2 under a patta of 1762. No rent, it is stated, was fixed at the time of the grant, but it was fixed subsequently at Rs. 656-12-0, and a kabuliyat dated

*Since reported in 59 M.L.J. 731.

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Bishun died about this time, and was succeeded by his brother Makund Singh, who was the Raja of Ramgarh in 1765, the date of the accession of the East India Company, and the following years. The difficulties experienced by the Company at this time in getting in the revenue and the measures they adopted, such as setting aside the old zemindars who were in arrear and granting pattas to strangers, are matters of history. It is only material to note here that, when the zemindars were set aside, they were commonly allowed to remain in possession of their malikana or allowances, including their nankar or revenue-free villages.

In the years immediately following, the revenues of the Chota Nagpur plateau, including Ramgarh, were again rented by Khandur Khan, the zemindar at the foot of the hills, and by his son after him, but they failed to collect the revenue from Makund Singh or to restore the Chai zemindars, as ordered by the Company. Shitab Rai states, at the end of his report, that in 1769 Captains Goddard and Camac were sent to collect the revenue and Makund Singh was reduced to submission. The report stops at this point, and the next evidence is that in 1771 Makund Singh was granted a patta for Chai and Champa at a jama of Rs. 9,501, and in September, 1772, a three years' patta for Chai Champa and Ramgarh at a jama of Rs. 27,000, as well as separate settlements for Palmanau and Chota Nagpur. None the less, a few months later he was again in rebellion, and was put to flight by a military force under Captain Camac; and Tej Singh, a member of the senior branch of his family, who had joined forces with the Company, was installed in his place.

It was apparently with reference to the period of Tej Singh's accession that Lieutenant Robertson, in his report on the land tenures of Hazaribagh, prepared in 1876 for the purposes of the Statistical Survey of India, stated that the Rajas of Chai "endeavoured to get settlements made with them direct, but their efforts failed, and, though they were maintained each in his Raj, they were directed to pay their tribute, which was then co... ted to a fixed rental, to the Ramgarh Raja. The ... Jagodih, Purona and Ikthori, accepted these ... de shikmi talukdars."

... s intended appears from the letters ... in the 1792 suit, but, as already ... d possession of his nankar vil- ... Tej Singh stated that he ... ll possible efforts to have

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the case of the Rajas of Chai taken up, and that, when the tilak of Raj or robe of investiture was conferred upon him, he promised that he would give the Raj to all the three Rajas, and would receive the proper amount of rent from them and would pay it to Government. If this had been done the whole of these estates would have become shamilat taluks of Ramgarh.

There is a letter of about the same date from Captain Camac to Raja Lall Khan of Jagodih and the other Chai Rajas stating that he had been under the impression that they were already in enjoyment of their heritage, and that he would be glad to see a settlement of the revenue made with them, but that, if not, they would have their malikana, which would, of course, include the nankar or revenue-free villages which are the subject of this suit.

That they did, in fact, get possession of their nankar or revenue-free villages and held them as such and not in jagir as contended for the plaintiff, appears from the letter of Tej Singh's successor Paranath Singh in 1777. In it he states that the hukmi of the nankar villages, then held by Lall Khan, had always been remitted and there was to be no interference with this. This letter is really destructive of the plaintiff's case that the suit villages were in possession of Lall Khan, not as his old zemindari nankar, but as a jagir granted to him by Bishun Singh.

Further, the evidence shows that four years later these villages were assessed by the Government as nankar. As the Subordinate Judge has pointed out, it was the policy of the Company, afterwards embodied in the Permanent Settlement Regulations, that these nankar lands were no longer to remain free from assessment, but were to be annexed to the malguzari or revenue-paying lands. There is a letter of the 5th December, 1781, from the Collector, Mr. Chapman, to Lall Khan and a fellow Raja, stating that he had appointed Lala Subun Rai to collect one-fourth of the jama of their villages, and that they were to pay him this 1|4th, and appropriate the remaining 3|4ths for themselves. In imposing this very [illegible]
assessment, the Collector was obviously [illegible]
Company's orders for the assessment o[illegible]
is unnecessary to refer in detail t[illegible]
show that at this time it was in [illegible]
Chai Rajas to their malguzari or [illegible]
as they are not the subj[illegible]
letters are the only evid[illegible]

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of Civil Procedure. Even now failure to sue for a declaration in no way bars a claim for substantive relief when it arises.

As was usual, the plaint set out the documentary and other evidence on which the plaintiffs relied in proof of their titles, and mentioned their possession of the zemindari nankar as part of such evidence. This was met, on the other side, by a denial that they had any such nankar, and an assertion that their villages were held on jagir tenure.

If the merits had been gone into, this question might have had to be investigated, but all the three Courts held that they were precluded by section 14 of the Regulation of 1793 from going into the merits, because as stated in the judgment of the Court of Sudder Dewanny Adawlat, the plaintiff-appellants had "admitted that they were out of possession of the zemindaris claimed by the plaintiffs before the accession of the East India Company, and it has been proved by the evidence of the witnesses that they never got possession thereof since then."

In their Lordships' opinion, this judgment cannot be read as giving rise to any plea of *res judicata* with reference to the nankar lands.

In the result, their Lordships are of opinion that the plaintiff has failed to discharge the statutory burden imposed on him, and that the appeal should be allowed, the decree of the High Court reversed, and the decree of the Subordinate Judge restored, and they will humbly advise His Majesty accordingly. The respondents must pay the appellant's costs throughout.

Solicitors for appellant: *Watkins & Hunter.*

Solicitor for respondents: *Solicitor, India Office.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

...ppeal from the High Court of Judicature at Patna.]

...SENT:—LORD ATKIN, LORD MACMILLAN AND SIR JOHN

...eswari Charan Singh .. *Appellant**

v.

...r Kamakhya Narain Singh .. *Respondent.*

P. C.

Bageswari Charan Singh *v.* Kumar Kamakhya Narain Singh.

...ota Nagpur Tenancy Act, (VI of 1908), S 84 (3)—*Presumption of* ca... *...ness of entries in record-of-rights*—Onus probandi—*Zemindar and* ja... *...r—Ownership of minerals*—Khorposh *or maintenance grants in favour* o... *...ior or junior members of zemindar's family*

*P.C Appeal No. 47 of 1928.
Patna Appeal No. 14 of 1927.

21st October, 1930.

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S. 84 (3) of the Chota Nagpur Tenancy Act, 1908, imposes on the party challenging an entry in the record-of-rights the burden of proving by evidence that it is incorrect

As between the zemindar and jagirdar, the zemindar must be regarded as the owner of the minerals.

There is a general presumption that the land in a zemindari is the property of the zemindar and held under him.

Where the zemindar and the tenure-holders are members of the same family, the natural inference would be that it was a maintenance jagir granted to them by the head of the family. If they were descended from a junior branch of the family, such an inference would be irresistible; but the fact that they constitute the senior branch is not by itself sufficient to rebut this presumption

Judgment of the High Court, Patna, affirmed

Appeal No. 47 of 1928 against the decree of the High Court, Patna, dated the 21st January, 1927, which reversed the decree of the Subordinate Judge of Hazaribagh, dated the 22nd December, 1922.

The material facts of the case are sufficiently fully set out in their Lordships' judgment.

De Gruyther, K.C. and *Dube* for appellant.

Upjohn, K.C., L. P. E. Pugh and *W. Wallach* for respondent.

During the argument, *Surendra Nath Kuran Deo* v. *Kumar Kamakhya Narain Singh*[1] (a case from the same zemindari) was cited.

21st October, 1930. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—In this, as in the case of *Sir Charu Chandra Ghose* v. *Kumar Kamakhya Narain Singh*[2] in which judgment has just been delivered, the main issue is as to the correctness of an entry in the khewat or record-of-rights of the Ramgarh zemindari prepared under the provisions of the Chota Nagpur Tenancy Act, 1908. Section 84, sub-section (3) of that Act imposes on parties challenging such an entry the burden of proving by evidence that it is incorrect.

The suit is brought on behalf of the minor Raja [illegible] garh for a declaration that the defendants have no ri[illegible] minerals in the villages held by them and for an in[illegible] and damages. The claim for damages has been withdrawn. The defendants denied that they derived title from the plaintiff or his predecessors-in-title, and alleged that they themselves were the owners of the villages and of the subjacent minerals.

In the khewat the defendants' tenure is entered as jagir held under the Raja of Ramgarh resumable after the family

1 (1929) 59 M L J. 731 (P.C).
2 (1930) 60 M L.J. 245 (P.C.).

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of Fateh Singh, the supposed grantee, becomes extinct without any heirs being left at an annual rent of Rs. 1,387-1-9, and cesses amounting, at the time of survey, to Rs. 2,112-6-0. If this entry is correct, the plaintiff must be regarded as the proprietor of the villages and the defendants as holding under him, and it is well settled that, as between zemindar and jagirdar the zemindar must be regarded as the owner of the minerals.

It is, therefore, incumbent on the defendants to show that the entry is incorrect. Apart from the statutory presumption arising in this case, there is a general presumption that the land in a zemindari is the property of the zemindar, and held under him. In the two cases from this zemindari which have already come before the Board there was evidence that the defendant tenure-holders were the original proprietors of the suit villages, and it was not shown that they had come to be held from Ramgarh zemindars as jagirs. They were, therefore, held to have been correctly entered in the khewat as shamilat taluks, that is to say, taluks of which the talukdars were the proprietors though liable to pay the Government revenue to the zemindar of Ramgarh instead of directly to Government. In the present case the Subordinate Judge held that the defendants had established this, and dismissed the plaintiff's suit; but the Appellate Court were of a contrary opinion, and gave the plaintiff a decree. In their Lordships' opinion the defendants have wholly failed to prove their title and have no answer to the plaintiff's suit.

The plaintiff and the defendants are members of the same family, and it is not questioned that, if the defendants were junior members of the family the natural inference would be that this was a *khorposh* or maintenance jagir granted to them by the head of the family. It is said, however, that the defendants he senior branch of the family, and that it ought to be hat they do not hold these villages under grant from garh Raja, but merely pay him the Government reve- an estate which their ancestors acquired by force of

eir Lordships are unable to agree with this contention, of opinion that the fact that the defendants are descend- a senior branch of the family is insufficient to rebut esumption that the lands which they hold in the zemin- e held from the zemindar as *khorposh* or maintenance .

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It is common ground that the zemindari was acquired by Bagdeo Singh, the junior brother of Singdeo Singh, from whom the parties to this suit are descended.

The following genealogical table is taken from the Subordinate Judge's judgment:—

T S. No. 252 of 1920.

- Singdeo Singh.
  - Rajbal Singh.
    - Kirat Singh.
      - Mohkom Singh.
        - Jagat Singh.
          - Fateh Singh
            - Bhawani Singh.
              - Kahar Singh.
                - Churaman Singh.
                  - Deocharan Singh
                    - Bhatro Charan Singh.
                    - Ragho Singh
                    - Jadocharan Singh, D.1
    - Ajab Singh.
      - Gulal Singh
        - Murari Singh
          - Tej Singh.
            - Paresh Singh.
              - Maninath Singh.
                - Sidhnath Singh.
                  - Lakshmi
                  - Sambhu Ramnath.
            - Bodh Singh.
              - Janardan Singh.
                - Brahma Narain Singh
                  - Namnarain Singh.
                    - Ramnarain Singh
                      - Lakshmi Narain Singh.
                        - Kamakshya Naraj
                          Singh (P.)
- Bagdeo Singh.
  - Hemat Singh.
    - Ram Singh
      - Dalil Singh.
        - Maharudra Singh
          - Bisan Singh.
          - Puratan Singh.
          - Makund Singh.

The zemindari descended in the line of Bagdeo
Mukund Singh, who was dispossessed by the East In
pany in 1772, when Tej Singh, from whom the present ze
dar is descended, was installed in his place. Tej Singh
his descent from Ajab Singh, the junior brother of Kirat
from whom the defendants are descended, and was
because he had gone over from Mukund Singh, in wh
vice he had been, and joined forces with the Company in d
him out. According to tradition the two brothers, S
Singh and Bagdeo Singh, were Rajputs who came from an

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Sir John Wallis

"The 7th Aghan Badi, 18, (torn) Sambat, corresponding to the 4th November, (torn) 91."

The Appellate Court have held this document to be genuine but invalid, as infringing the rights of the zemindar under the patta of 1790. Their Lordships are unable to share this view. They find it difficult to believe that the Collector, merely because he was pleased with Fateh Singh and Bechu Singh for following his advice in coming to a settlement with their ryots and in consideration of their former services, would have taken upon himself to remit land revenue to which the zemindar was entitled under his patta. It appears to them much more likely that, as contended before the Appellate Court, these villages were treated as lakhiraj and left unassessed at the decennial settlement. In that case, more especially if no grant of exemption by Government was forthcoming, the Collector may well have felt himself authorised by virtue of the authority vested in him, either to resume the revenue and assess the villages, or for the reasons mentioned in the sanad, to regularise the existing situation by making, on behalf of the Government, a formal remission of the land revenue.

It is, however, in their Lordships' opinion, quite immaterial for the purposes of the present case, whether or not Mr. Dallas granted the alleged remission, and whether or not he had authority to do so. The rem[...] the Government of its right to the land revenue o[...]ges could in no way [...] the Ramgarh Raja's r[...]hts in these villages or [...]ht as against tenu[...]r him, to claim the [...]hip of the mine[...]

[...] their Lordsh[...]peal fails and should be dismissed, and th[...]se His Majesty accordingly. The ap[...]espondent's costs of the appeal.

Solicitor[...]ns & *Hunter.*

Solici[...]*itor, India Office.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Sree Rajah Malraju Venkata Narasimha Rao Bahadur Zamindar Garu .. *Petitioner**

v.

The Municipal Council of Narasaraopet represented by Tadepalli Sampoorna Lakshminarayana Pantulu Garu, Chairman and others .. *Respondents.*

Venkata Narasimha Rao Bahadur v. The Municipal Council of Narasaraopet.

Certiorari—*Election of Chairman by Municipal Council—Result of poll declared by Presiding Officer and entered in minute book—No adjudication as to validity of votes—Ministerial not judicial act*—Certiorari *taken away by Statute—Power of Court to issue writ*

At a meeting of a Municipal Council a Chairman was elected and the Presiding Officer declared the result of the poll and entered the same in the minute book Otherwise no resolution was passed as regards the election nor was there any adjudication as to validity of votes. A writ of *certiorari* was applied for as against the Municipal Council in order to have the election quashed on the ground that it was held with an open ballot contrary to the rules.

Held, that the act of the Presiding Officer in declaring the result of the poll was a purely ministerial or administrative act and not a judicial or *quasi*-judicial one and a writ of *certiorari* should not be issued in respect of such an act

"Judicial act" explained.

Per *Ramesam, J.*—Even in cases where *certiorari* is taken away by Statute a writ may be issued if the authority acted without jurisdiction. But it must be done under exceptional circumstances.

Ex parte *Bradlaugh,* L.R. (1878) 3 Q B.D. 509, relied on.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* to the respondents herein (1) calling for records in the matter of the resolution of the Municipal Council of Narasaraopet, dated 5th November, 1929 and referred to in the affidavit, and (2) to quash the proceedings dated 5th November, 1929.

Ch. Raghava Rao and *B. T. M. Raghavachari* for petitioner.

P. Venkataramana Rao and *V. Subramaniam* for respondents.

The Court delivered the following

Ramesam, J.

ORDER. *Ramesam, J.*—This is an application by Sri Rajah Malraju Venkatanarasimha Rao Bahadur Garu of Narasaraopet for a writ of *certiorari* to be issued to the three respondents who are (1) the Chairman of the Narasaraopet Municipal Council elected at a meeting on the 5th of November, 1929, (2) the Municipal Council, and (3) the Vice-Chairman

*C.M.P. No. 128 of 1930. 16th April, 1930.

of the Municipal Council who presided at the meeting of the 5th of November for electing the Chairman, and for setting aside the alleged resolution of a meeting on that day declaring the 1st respondent to have been duly elected as Chairman. The petitioner is the other candidate for election.

An application was made to the Government by the petitioner for setting aside the election on the ground of various irregularities in the election; but the Government while finding that "the action of the Councillors in violating the provisions of R. 4 of the rules for the election of Chairman and Vice-Chairman of the Municipal Councils prescribing secret voting was highly irregular" did not interfere with the election in question and passed an order leaving the aggrieved parties to the legal remedies. Immediately after the said order of the Government (on the 10th of December, 1929) the present petition was filed. We issued an interim writ. The Municipal Council of Narasaraopet appear by counsel and oppose the application.

The first point that would suggest itself is the question whether the writ of *certiorari* ought to be issued *when there is another remedy open. Under the election rules an election petition lies;* but unless the statutes or bye-laws made under the statutes take away the remedy by *certiorari* the writ may be issued. Where it is laid down in the statutes or bye-laws made under the statutes that proceedings under them shall not be removed by the writ of *certiorari,* then *certiorari* is said to be tak[illegible] by such statutes; that is, it is taken away only by [illegible]gative words and not merely by words which direct [illegible]n matters shall be finally determined. *Vide* Hals-[illegible]0, section 345. But even in cases where *certiorari* [illegible]y a writ may be issued if the authority acted with-[illegible]ction. *Vide* Halsbury, Vol. 10, section 348. This [illegible]ocedure adopted in Ex parte *Bradlaugh*[1]. See also [illegible] *Lal Bose* v. *The Corporation for the Town of Calcutta*[2]. [illegible]t to be done under exceptional circumstances only.

The next question is whether in this matter the resolution which is sought to be set aside is an act of a judicial authority. The writ lies for the purpose of quashing the determinations of bodies who are entrusted with judicial functions out of the ordinary course of legal procedure. *Vide* Halsbury, Vol. 10,

1. L.R. (1878) 3 Q.B.D. 509   2. (1885) I.L.R. 11 C. 275.

Venkata Narasimha Rao Bahadur v. The Municipal Council of Narasaraopet.

Ramesam, J.

section 320. Even in respect of such bodies the writ lies only in judicial as distinguished from ministerial acts. In *Frome United Breweries Co.* v. *Bath Justices*[3] Lord Atkinson quoted the dictum of May, C.J., in *Reg* v. *Dublin Corporation*[4] as follows:

> "In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to be that the acts of such a body involving such consequence would be judicial acts"

In the present case, we find that the proceedings of the Council, dated 5th of November, 1929, do not contain even a resolution of the Council. They recorded the facts relating to the election and the declaration of the returning officer (the Vice-Chairman) declaring the votes obtained by each candidate and who got the majority of the vote. I am unable to see in this the act of any tribunal, judicial or *quasi*-judicial. There was no question of the validity of the voting papers. The Council or even the Chairman did not purport to enquire into any matter or weigh the evidence relating to any matter in dispute or consider it in any manner that can be considered judicial or *quasi*-judicial. On this ground we dismiss the application with costs of 1st and 2nd respondents. Advocates' fee being fixed at Rs. 25.

Cornish, J.

Cornish, J.—I am of the same opinion. The affidavits disclose irregularities in the manner of voting which [illegible] been challenged in an election petition. But there w[illegible] done by the Municipal Council in the nature of a [illegible] to which the remedy of a writ of *certiorari* would b[illegible] When this case was first argued it was represented t[illegible] strength of the petitioner's affidavit that the Council [illegible] a resolution adopting the election of the 2nd responde[illegible] Chairman of the Council. But the 2nd respondent's af[illegible] which has since been filed denies that there was any resolution of the Council upon the matter, and this appears to be the fact from an examination of the Council's minute book. The Council did not, therefore, profess to "exercise some right or duty to decide", which, as Fletcher Moulton, L.J., has explained in *R.* v. *Woodhouse*[5], is necessary to provide scope for the writ of

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3 (1926) A C 586 at 602. 4 L R (1878) 2 Ir 371.
5. (1906) 2 K.B. 501 at 535.

Venkata Narasimha Rao Bahadur v. The Municipal Council of Narasaraopet.

Cornish, J.

certiorari. All that was done was to record in the minute book the result of the poll as declared by the presiding member. The act of the presiding member in declaring the result of the poll was a purely ministerial or administrative act. See *Pritchard* v. *Mayor, etc., of Bangor*[6]. And a writ of *certiorari* cannot be granted in respect of such an act: *R.* v. *Woodhouse*.[5]

The learned counsel for the petitioner has argued that the presiding officer was under a duty to decide upon the validity of the votes given in such circumstances, and that he must be deemed to have decided that notwithstanding the irregularity in the voting the voting papers were valid.

Reference has been made to the following passage in Lord Halsbury's judgment in *Pritchard* v. *Mayor, etc., of Bangor*[6] p. 249) in regard to the functions of the returning officer at a municipal election:—

"He is to do therefore the thing which the statute expressly says he shall do, namely, to count the votes, that is to say the written papers so put into the ballot boxes, and according to their number to declare which candidate is elected. One function is no doubt given to the returning officer, and that is a judicial function, with regard to the question of the validity of the voting papers as papers, to see whether they comply with the statute or whether there is any objection to them"

Those are precisely the functions given to a presiding member by the rules framed under the Madras District Municipalities Act for the election of a Chairman. He is to count the voting papers placed in the ballot-box, and those papers are to be marked only by the voters placing a cross against the name of a candidate on the paper. R. 6 provides that any voting paper which contains the signature of the voter or on which the cross is placed against more than one name shall be invalid. A voting paper which on the face of it offended against R. 6 would not be counted by the presiding officer. But, with this exception the rules give him no power to adjudicate upon the validity of a vote. In my judgment, nothing done by the presiding officer in the declaration of the result of the poll exceeded his strictly ministerial functions, and, accordingly, there is no ground for the grant of *certiorari* in respect of anything done by him.

B.V.V. *Petition dismissed.*

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5. (1906) 2 K.B. 501 (C.A.). 6. (1888) 13 A.C. 241 at 253.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Arumilli Viramma .. *Appellant* in A.A.O. No. 218 of 1930 and Petitioner in C.R.P. No. 868 of 1930 on the file of the High Court (1st Counter-petitioner)*

v.

Arumilli Seshamma *alias* Chittemma and another .. *Respondents in both (Petitioner and 2nd Counter-petitioner).*

Viramma v. Seshamma.

Succession Act (XXXIX of 1925), Ss 222, 234 and 244—Executor by implication—Minor executor—Letters of administration—Right to apply for.

Where a will, after providing for certain specific legacies, directed that "my nephew is to discharge the debts due by me to the world", the nephew is appointed an executor by implication.

S. 234 is not applicable when the executor appointed by the will is a minor; the case is governed by S. 244 and it is open to the legal guardian or "such other person as may seem to the Court fit" to apply to be appointed the minor's guardian for the purpose and to have letters of administration issued to him.

Appeal preferred against and Civil Revision Petition presented under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of East Godavari at Rajahmundry, dated 13th November, 1929 and made in O.P. No. 85 of 1929.

Probate Proceedings.

One Arumilli Krishnamurthi died on 5th September, 1928. His mother, A. Seshamma, put in a petition under section 237 of the Succession Act for a limited grant of probate of a will alleged to have been left by the said Krishnamurthi on 26th February, 1928, in terms of the draft copy filed with the petition. By the terms of the alleged will, the major portion of the properties of the testator was divided among his mother, his sisters and sister's son, to the exclusion of his widow. The will concluded as follows:—

"The rest of the lands belonging to me in all amounting to acres 9.60 cents with all trees and all house-sites . . . . and moveable properties like decrees and all other moveable properties belonging to me are to be enjoyed by C. Ramarayudu, son of my eldest brother-in-law, with absolute rights. It is devised that my nephew Ramarayudu is to discharge the debts due by me to the world. My daugh-

*C.M.A. No. 218 of 1930 and C.R.P. No. 868 of 1930. 14th November, 1930.

Viramma v. Seshamma.

ter is to be married to him and in case it fails . . . he is to pay Rs. 1,000 towards marriage expenses He is also to give Rs. 1,500 towards the construction of a temple and see that daily worship is performed in my gotranama. He has also to give Rs 1,000 towards the marriage expenses of the daughter of my second sister. All the properties given to my nephew Ramarayudu are to be managed by my eldest brother-in-law during the former's minority and improve the same"

The widow objected to the grant. She denied the factum of the will and also contended that the petition was not maintainable, as the petitioner was not an executrix appointed under the alleged will. The objection was upheld but the Court, however, allowed it to be treated as an application under section 234, as "the alleged residuary legatee—granting he is one—is a minor". The present appeal was filed by Veeramma, the widow, from this order.

It was urged in appeal that the Court had no jurisdiction *suo motu* to treat an application for a limited grant as one for a general grant, that section 234 could not be invoked by the mother who was a specific legatee when there was a residuary legatee (the nephew) with a proper guardian capable of acting on his behalf, that the correct procedure was under section 244, and that if even section 234 applied the person otherwise entitled under the personal law within the meaning of section 234 would be the widow and not the mother.

A. Lakshmayya for appellant.

N. Rama Rao for respondent.

The Court delivered the following

Beasley, C J.

JUDGMENTS. *The Chief Justice.*—In this case the 1st respondent, the grandmother of one Ramarayudu, a minor, applied to the Lower Court for a limited grant to her of probate of a will asserting that a man named Krishnamurthi, her son, had died and that previous to his death he had made a will under the provisions of which she herself was a legatee and some of the property fell to her grandson a minor. This alleged will effectively shut out the alleged testator's widow the counter-petitioner on the petition in the Lower Court. The 1st respondent accordingly applied to have the will probated and eventually recognising that she was not entitled to ask for probate changed the nature of her application and asked instead to have granted to her letters of administration. This application was refused; and on the 13th November last the learned District Judge passed the following interim order:—

"There is no ground to reject the application This is really governed by section 234 The alleged residuary legatee—granting he is one—is a minor."

That is the order appealed against here. The question which in my view determines this matter is whether the minor

Viramma v. Seshamma.

Beasley, C. J.

was under the alleged will an executor by implication. The alleged will put forward states as follows:—

"It is devised that my nephew Ramarayudu is to discharge the debts due by me to the world."

The question is whether that provision makes Ramarayudu an executor by implication. Section 222 of the Indian Succession Act says that probate shall be granted only to an executor appointed by the will and that the appointment may be expressed or by necessary implication. Here of course no question arises as to whether there was an express appointment of Ramarayudu as an executor but the only question is whether by necessary implication he was so appointed. To section 222 there are three illustrations and the third illustration seems to me to cover this case. There the words were: "I appoint my nephew residuary legatee to discharge all lawful demands against my will and codicils signed on different dates" and my nephew was held to be appointed an executor by implication. The wording there seems to me to be very similar to the wording in the present case and, in my view, the minor was clearly appointed an executor by implication. If that is so, the learned District Judge was wrong in saying that the application was covered by section 234 of the Indian Succession Act. It clearly was not. That section only deals with cases where no executor has been appointed or if an executor has been appointed he declines to act. Here an executor was appointed and it was not a case of his declining to act because in law he could not act. In my view, minor executors are expressly and solely provided for by section 244 of the Act. Where a minor executor is appointed, then it is open to his legal guardian or such other person as may seem to the Court fit, to have letters of administration issued to him; and, if there is any section at all in the Indian Succession Act which enables the respondent in this case to apply for Letters of Administration. it is section 244. In *Bhagwati Kuer* v. *Bahuria Ramsakhi Kuer*[1], which followed the decision in In the goods of *Nirojini Debi*[2], the corresponding section 33 in the Probate and Administration Act (V of 1881) was considered and it was held that before letters of administration can be granted to a legal guardian of a minor, the legal guardian must apply to be appointed the minor's guardian for the purpose of enabling him or her to obtain those letters of administration for the use and benefit of the minor. In this case there is no such application by

1. (1920) 5 Pat. L.J. 347. 2 (1907) I.L.R. 34 C. 706.

the respondent and being of the opinion as I am that the only section under which this application can be made is section 244, this appeal must be allowed. In doing so, we leave it open to the respondent to get herself appointed if she can as the guardian of the minor. Then, if the Court so think fit, she can obtain Letters of Administration. This appeal must, therefore, be allowed with costs. No orders are necessary on the Civil Revision Petition.

Viramma v. Seshamma. Beasley, C. J.

Pakenham Walsh, J.—I agree.

S.R. *Appeal allowed.*

Pakenham Walsh J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Shankarnaraina Saralaya .. *Appellant**
(*Petitioner Defendant*)

v.

Laxmi Hengsu and others .. *Respondents*
(*Supplemental Respondents*).

Civil Procedure Code (V of 1908), O. 22, Rr 3 and 11—Two independent appeals against single decree—Death of respondent in one appeal—Legal representatives not impleaded—Same persons brought on record in connected appeal—Abatement—Grant of relief in connected appeal under O 41, R. 33.

Shankarnaraina Saralaya v. Laxmi Hengsu.

Where two independent appeals were preferred, one by the plaintiff and the other by the 2nd defendant, against the decree passed in a suit and the plaintiff having died during the pendency of the appeals his legal representatives were impleaded in the appeal referred by him but they were not brought on record in the appeal filed by the 2nd defendant,

Held, that the joinder in the one appeal did not enure for the benefit of the other appeal as well and that the appeal preferred by the 2nd defendant consequently abated To such a case the analogy of appeal and memorandum of objections is inapplicable.

Vathiar Venkatachariar v. *Ponnappa Aiyangar,* (1918) 7 L.W. 614, distinguished.

Brij Indar Singh v. *Kanshi Ram,* (1917) L.R. 44 I.A. 218: I.L.R. 45 Cal 94 · 33 M.L.J. 486 (P.C.), considered

Held, further, that though the order of abatement could not be set aside it was still open to the 2nd defendant-appellant, who was a respondent in the other appeal, to ask the Appellate Court to exercise its powers under O. 41, R 33, Civil Procedure Code, and give him relief.

Appeal against the order of the Court of the Subordinate Judge of South Kanara, dated 5th July, 1927, and made in R.I.A. No. 449 of 1927 in A.S. No. 151 of 1926.

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*A.A.O. No. 496 of 1927. 16th September, 1930.

Shankarnaraina Saralaya v. Laxmi Hengsu.

K. Srinivasa Rao for *B. Sitarama Rao* for appellant.

K. Y. Adiga for respondents.

The Court delivered the following

JUDGMENT.—This is an appeal preferred against the order of the Subordinate Judge of South Kanara refusing to set aside the order of abatement in A.S. No. 151 of 1926 on his file. It appears that two independent appeals were filed against the decree of the first Court passed in the suit, one appeal being by the plaintiff and the other appeal by the 2nd defendant. In the appeal filed by the 2nd defendant, the legal representatives of the respondent, namely, the plaintiff, not having been added within the time prescribed by law, there was an abatement and, when that abatement was sought to be set aside, the Lower Court found that there was no ground for allowing the petition on the merits and dismissed it.

The point now taken in this appeal is a pure question of law. It is argued that, because the legal representatives of the appellant in the other appeal (who is no doubt the plaintiff in the suit) have been added within the time allowed, it should be taken that those legal representatives have also been added in place of the deceased respondent in this appeal. There is no authority directly bearing on the question that arises in this appeal. There is no interdependence between these two appeals and the analogy of an appeal and a memorandum of objections in the same appeal does not hold good in the present case, where we have to deal with two separate and independent appeals though arising from the same suit. The decision in *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] relied on by the learned advocate for the appellant does not seem to help him in this case. In that case, though the legal representative of the deceased respondent was not added in the appeal within the prescribed period of time, that legal representative came into Court with a memorandum of objections in connection with that appeal. The learned Judges held that the rule requires that a person should be a respondent in the appeal in order to entitle him to file cross-objections and, therefore, when the legal representative of the respondent was allowed to come on the record in connection with the memorandum of objections, he was in effect made respondent in the appeal also. On this special ground, it was held that there was no abatement of the appeal. In the present case when there are two independent appeals, the

1. (1918) 7 L.W. 614.

Shankarnarayana Saralaya v. Laxmi Hengsu

principle of the aforesaid decision cannot reasonably be extended and, therefore, it is not possible to assume that the legal representatives of the respondent in the present appeal have been brought on record merely because they came to be added in the other appeal as the legal representatives of the deceased appellant. The decision in *Krishnama Chariar* v. *Mangammal*[2] proceeded mainly on the meaning to be attached to the expression "final decree" in Art. 197 of the Limitation Act (XV of 1877) for the purpose of computing the starting point for limitation as regards an application for execution. The date of the final decree of the Appellate Court being the starting point for limitation, it was held that limitation should be computed from that date for executing any portion of the decree in the suit, though that particular portion of the decree was not the subject-matter of the appeal. I fail to understand how the view taken in that decision can be of any avail to the appellant in this case.

There remains the decision of the Privy Council reported in *Brij Indar Singh* v. *Kanshi Ram*[3]. In that case when an order on an interlocutory application passed during the course of a suit was made the subject of an appeal or revision in the Appellate Court and when the legal representative of the original plaintiff was brought on record in the Appellate Court as the death of the plaintiff occurred during the pendency of the matter before the Appellate Court, it was held that, when the suit had to be tried again by the first Court after the disposal of that appeal, no fresh application to bring in the legal representatives of the deceased plaintiff was necessary. Their Lordships have held that the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. When the subject-matter of the interlocutory application was pending in the Appellate Court, it was deemed to be one stage of the suit and therefore there was no need to put in a fresh application at a further stage of the suit when it came on for trial before the first Court. Can it be said in the present case that what was done in one appeal could enure for the benefit of another appeal, unless the latter appeal can be deemed to be a continuation of a further stage of the appeal in which the legal representatives were brought on record? I am constrained to say that it is difficult to extend the principle of the decision of the Privy Council to the facts of this case. Though the order of abatement in this appeal cannot be set

2 (1902) I.L.R. 26 M. 91 (F.B.)

3 (1917) L.R. 44 I A. 218: I.L.R. 45 C 94: 33 M.L.J. 486 (P.C.)

Shankarnaraina Saialaya v. Laxmi Hengsu.

aside, it is still open to this appellant who would be a respondent in the other appeal to ask the Appellate Court to exercise its powers under R. 33 of O. 41, Civil Procedure Code and give any proper relief to him, if it is legally permissible to do so.

There being no provision of law or express authority in favour of the contention put forward on behalf of the appellant, I should disallow that contention and dismiss this appeal with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

In the matter of the Indian Companies Act VII of 1913

and

In the matter of the Madras Native Permanent Fund, Ltd.

B. G. Kolandavelu Mudaliar and others .. *Petitioners*.*

In re Kolandavelu Mudaliar.

Companies Act (VII of 1913), *S* 235—Ultra vires *borrowing by company—Misfeasance summons taken out by depositors—Maintainability—Mode of enforcing rights of depositors.*

A company under the name of the Madras Native Permanent Fund Limited was started with a certain capital which was to be realised from the shareholders in monthly instalments The objects of the company as stated in the Memorandum of Association were to make advances to shareholders upon security of moveable or immoveable property for enabling them to purchase, build and repair houses and to grant to them simple loans to a limited extent and to do such things as were incidental to the attainment of the said objects. Subsequently, a new branch called the Deposit Branch was started and the capital of the company having been raised, the same was allotted to the Deposit Branch. The dealings of the old and new Branches were kept distinct and while the old branch was confined to the original objects the new branch developed into an ordinary Bank receiving deposits and advancing loans, the customers consisting of members and strangers In course of time the company sustained loss and an order for its compulsory liquidation was made by Court. Later on certain of the depositors took out a misfeasance summons under S 235 of the Companies Act wherein they alleged certain breaches of trust and prayed that the Directors and certain officers of the company should be ordered to bring back into Court a certain sum of money.

Held, that the depositors were not creditors in the eye of the law inasmuch as the banking business carried on by the company was an *ultra vires* transaction and consequently the misfeasance summons could not be entertained at their instance.

Held, further, that the rights of the depositors could be enforced in the manner specified in *Sinclair* v. *Brougham,* L.R. (1914) A.C. 399.

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*O.P. No. 75 of 1927. 7th October, 1930.
Applications Nos. 436 of 1930, 3485 of 1929 and 820 of 1930.

O. T. Govindan Nambiar instructed by Messrs. King and Partridge, Attorneys for Messrs. Fraser and Ross, the Official Liquidators herein and *N. Rajagopalan* for *V. Sundaresa Aiyar* for applicant in Application No. 820 of 1930.

S. Duraiswami Aiyar with *T. K. Rangaswami* and *V. Balaraman* for T. S. Natesa Sastri, President of the above-named Fund.

V. Radhakrishnayya for *K. B. Ranganadha Aiyar* for P. Lakshminarasu and Directors of the said Fund.

K. Ramachandra Sastri for *A. V. Seshayya* for P. Duraiswami Mudaliar and C. Masilamani Mudaliar, 2nd and 3rd respondents in Application No. 820 of 1930.

C. V. Athmanathan for 11th respondent.

K. Kuppuswami for Yegnanarayana (Contributory No. 244).

V. Rajagopala Mudaliar instructed by Messrs. Short Bewes & Co., Attorneys for P. M. Duraiswami Chetty, 7th respondent in Application No. 820 of 1930.

C. Srinivasachariar for *Devarajan* for Contributories Nos. 282 and 335.

S. Panchapagesa Sastri and *K. S. Viswanatha Sastri* for 6th and 8th respondents in Application No. 820 of 1930.

The Court delivered the following

JUDGMENT.—This is a misfeasance summons under section 235 of the Indian Companies Act. Certain breaches of duty are alleged against the Directors and some other officers of the Company and the summons asks, that they may be ordered to bring into Court a sum of about Rs. 42,000. An objection *in limine* is taken that the applicants have no *locus standi*. If they are creditors, as they allege themselves to be, they can apply under the section to which I have referred. The question is, are they creditors of the Company and have they as such a *locus standi?*

The Company was started in 1878 under the name of the Madras Native Permanent Fund, Ltd., with a capital of two lakhs divided into two thousand shares of Rs. 100 each. Each shareholder was to pay one rupee per month per share and, at the end of seven years, he was to receive from the Company Rs. 100 and his account was then to be closed; in other words, on his paying a sum of Rs. 84, he receives Rs. 100. The objects of the Company as stated in the Memorandum of Association were, to make advances to shareholders upon security of moveable or immoveable property for enabling them to pur-

In re Kolandavelu Mudaliar.

chase, build and repair houses and to grant to them simple loans to a limited extent and to do such things as are incidental to the attainment of the above objects. In 1887 a new branch was started and was called the *Deposit Branch*, to distinguish it from the *Loan Branch*, the name adopted to designate the Company's original activities. The capital of the Company was raised by Rs. 10,000 divided into thousand shares of Rs. 10 each and the shares newly raised were allotted to the Deposit Branch. It is stated for the respondents, that the accounts of each branch were separately kept and that there was no mixing up of the monies or the dealings of the two Branches. This statement is not merely borne out by such of the balance sheets as have been handed to me but is not even disputed by the applicants. While the Loan Branch was confined to the original objects, the Deposit Branch developed into an ordinary Bank and carried on Banking business. In fact, the operations of the Deposit Branch assumed large proportions, whereas the Loan Branch did business on a very limited scale. In the Deposit Branch, there were deposits and advances, customers depositing monies and loans being advanced on pledges of jewels. The customers of the Bank included both members and strangers. This went for about forty years and it was then found that the Company's affairs were not being conducted satisfactorily. Certain irregularities occurred, such as, loans being advanced on jewels of insufficient value. The result was, the Company having sustained a loss, the depositors were unable to get back their monies. A liquidation petition was filed and a compulsory order was made in May, 1927. To make clear the point that has now arisen, I may briefly refer to certain previous orders made in the course of the winding up. The liquidators, Messrs. Fraser & Ross, treated in the list filed by them, certain 357 persons of the Loan Branch, as contributories in the liquidation. Mr. Justice Waller observing

"The Loan Branch of the Fund is, I consider, nothing but a Mutual Benefit Society, with rules resembling those of the Mylapore Hindu Permanent Fund—vide *Board of Revenue* v. *Mylapore Fund*.[1]"

held that the 357 persons in question could not be treated as contributories The learned Judge in effect held that there was nothing illegal in the Company closing the accounts of the shareholders of the Loan Branch by paying each Rs. 100 at the end of seven years. The Appellate Court reversed the order of Mr. Justice Waller holding that the payment of the share

1 (1923) I.L.R. 47 M. 1 (F.B.).

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capital to the members contravened the provisions of the Companies Act as such payment amounted to a reduction of capital forbidden by the Act. The 357 persons were accordingly declared to be contributories. Before the Appellate Court, the question was raised, were the debts which it was sought to make these persons liable to liquidate, debts incurred *ultra vires* of the Company? This question was left open and no decision was pronounced upon it. This is what the learned Judges observe:

"When these persons are called upon to contribute to the liquidation of definite debts, it will be open to them to argue that the debts which they are called upon to contribute to pay are *ultra vires* of the powers of the Company, that is to say, are not in law debts at all."

The matter came back to the Original Side. For the contributories it was contended that the amounts which the Company made itself liable to return were those deposited by its customers in the Deposit Branch and that the Company, in receiving such deposits, practically converted itself into a Bank. This, it was argued going beyond the Memorandum of Association, was *ultra vires* of the Company. Mr. Justice Pandalai relying upon *Ashbury Carriage Co.* v. *Riche*[2] accepted this contention. From his judgment I quote the two following passages:—

"On the best consideration I can give to the matter, I see no escape from the conclusion that the taking of deposits in the Deposit Branch from strangers to the Company was *ultra vires* of the powers of the Company."

"All that I do decide and declare is that the contributories are not as such liable to contribute to the debts due to stranger depositors in the Deposit Branch of the Fund."

Some of these depositors are the applicants in this misfeasance summons. The short question I have to decide is, are the amounts due to them debts? In other words, are the lenders, in the eye of the law, creditors and is the borrowing Company, debtor? This point is now well settled by authority. Where the carrying on of a business by the Company was *ultra vires* it was held that the *ultra vires* transactions created no debt either legal or equitable. This was held in In re *Birkbeck Permanent Benefit Building Society*[3]. The facts of that case resemble those of the present. A Building Society carried on a Banking business altogether beyond what was authorised. Cozens-Hardy, M.R., observes that the so-called contracts of loan, though not illegal, are void and in truth have no existence. This is treated as the doctrine as to *ultra vires* borrowing. The case went up to the House of Lords and this view

2 (1875) 7 Eng. and Ir. App 653. 3 (1912) 2 Ch. 183

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was affirmed, although on another point the decision of the Court of Appeal was varied. (*Sinclair* v. *Brougham*[4].) The relation between the depositor and the Company is not that of debtor and creditor and the only possible remedy for the person who has paid the money is one *in rem* and not *in personam*. This is a most unequivocal declaration, that *ultra vires* transactions do not create the relationship of debtor and creditor. The preliminary objection, therefore, must be upheld and on this short ground the application is dismissed.

From this it does not follow that the lenders can, in no circumstances, recover their deposits. The very case I have cited, *Sinclair* v. *Brougham*[4], decides what their rights are and how and to what extent they can be enforced. There are no persons other than the depositors who have any claims to the monies in the Deposit Branch; the question of priority decided in *Sinclair* v. *Brougham*[4] does not therefore arise in this case. The Loan Branch, as I have said, was always treated as being separate from the Deposit Branch. Some trifling amounts are due to some unadvanced shareholders of that branch. I see no reason why they should not be paid the sums due to them from the monies to the credit of that branch. Now, as regards the depositors to whom monies are due from the Deposit Branch, they have already, under orders of Court, been paid sums amounting to over a lakh. These payments cannot be questioned. I may mention that some of the Directors of the Company are also among such depositors. They have offered, at my suggestion as a matter of fair dealing, to bring back the amounts they withdrew, during the period of one year before the commencement of the winding-up. As the other depositors have already been paid 11 annas in the rupee, these Directors are, on this basis, bound to bring back only a sum which represents five annas of their drawings. The following table shows the amounts that they are thus liable to bring back and I understand that they have this day paid these sums to the liquidators:—

Name.	Amount of Deposit withdrawn within one year before liquidation.	Amount to be refunded at 5 as. in the rupee		
	Rs.	Rs.	A	P.
P. Lakshminarasu Naidu	2,000	625	0	0
T S Natesa Sastri	1,500	468	12	0
V. Sadagopan Naidu	813	254	1	0
	Total	1,347	13	0

4. (1914) A.C. 399

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Of the sum of Rs. 436 mentioned in the affidavit of the liquidators Rs. 375 represents the sum paid to them by the first 2 of the 3 Directors named in the above table, when calls were made after the decision of the Appellate Court to which I have referred. This sum as well as the above-mentioned sum of Rs. 1,347-13-0 together with Rs. 1,500 (*vide* Application No. 3485 of 1929) shall, subject to the payment of all proper costs, be treated by the liquidators as available for distribution among the depositors of the Deposit Branch. Rs. 1,955-13-9 in the Loan Branch shall be distributed among the unadvanced shareholders of that branch; if any balance is left over, it shall be carried forward to the Deposit Branch.

This order disposes of (1) Application No. 820 of 1930 (misfeasance summons), (2) Application No. 436 of 1930 (the liquidators' application as to the disposal of Rs. 2,330-13-9 said to be the assets of the Loan Branch), and (3) Application No. 3485 of 1929 regarding the disposal of Rs. 1,500.

In the misfeasance summons, the liquidators shall take their costs which I fix at Rs. 150 and pay the applicants' costs which are also fixed at Rs. 150. In Application No. 436 of 1930 the liquidators may take Rs. 35 as their costs.

I desire, before closing, to tell the liquidators that they must, to save further costs, take steps to have the affairs of the Company wound up as early as possible.

B.V.V. *Order made.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD ATKIN, LORD MACMILLAN, SIR JOHN WALLIS, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Mitar Sen Singh .. *Appellant**

v.

Maqbul Hasan Khan and others .. *Respondents.*

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Caste Disabilities Removal Act (Freedom of Religion), (XXI of 1850), S. 1—Scope of—Person renouncing religion alone protected.

S. 1 of the Caste Disabilities Removal Act (XXI of 1850) in terms applies only to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste, and protects such person from losing any right of property or of succeeding as heir. It does not purport to deal with rights of inheritance of the children of the convert or other persons. When once

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*P.C. Appeal No. 123 of 1928. 30th June, 1930.
Oudh Appeal No. 7 of 1928.

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a person has changed his religion and changed his personal law, that law (and that alone) will govern the rights of succession of his children

Bhagwant Singh v *Kallu*, (1888) I.L.R. 11 All 100, overruled.

Vaithilinga Odayar v. *Ayyathorai Odayar*, (1917) I.L.R 40 Mad. 1118, approved.

Appeal No. 123 of 1928 from a decree of the Chief Court of Oudh, dated the 2nd December, 1927, which affirmed a decree of the Subordinate Judge of Fyzabad, dated the 14th February, 1927, and dismissed the plaintiff's suit with costs.

The sole question for determination on the present appeal was: whether a Hindu in the Province of Oudh has any right to inherit the estate of a Shia Muhammadan, who is descended from a Shia Muhammadan who was originally a Hindu, and who had become a convert to Islam, by reason of the provisions of the Caste Disabilities Removal Act (XXI of 1850). Both the Courts in India answered the question in the negative, and dismissed the suit of the plaintiff-appellant. The material facts of the case, for the purposes of the present report, are sufficiently fully set out in their Lordships' judgment.

It was urged on behalf of the plaintiff that the provisions of Act XXI of 1850 enabled him to claim the estate of a Muhammadan. The Subordinate Judge repelled the contention of the plaintiff, and the Chief Court, on appeal, came to the conclusion, agreeing with the Trial Judge, that the plaintiff had no right whatever to maintain his claim under the provisions of the said Act. The Chief Court summed up in the following words:—

"As we have already shown, the first portion of the section relates to the forfeiture of rights, that is vested rights, by reason of change in religion of the person in whom those rights reside and prevents forfeiture of such rights. The latter portion of the section relates to rights of inheritance before the opening of succession and protects the loss of such rights of the person who has renounced his religion or been excluded from caste while he occupies the status of an heir *simpliciter*. We are clearly of opinion that the words 'renouncing his or her religion' apply to both classes of cases, that is, the law affords protection against the forfeiture of vested rights and protection against the loss of status as an heir, and in both cases of the person who renounces his or her religion. The Act of 1850 was recently interpreted in the sense in which we have interpreted it by the High Court of Madras in *Vaithilinga Odayar* v *Ayyathorai Odayar*[1], and the Allahabad case (*Bhagwant Singh* v. *Kallu*[2]) was dissented from. The decision of the High Court at Lahore in the case of *Rupa* v. *Sardar Mirza*[3] was also quoted on behalf of the appellant In that case the learned Judges simply followed the decision in the Allahabad case and advanced no fresh arguments in support of the conclusion There are other decisions for the opinion which we have formed It will serve no useful purpose to recapitulate them in this judgment"

The plaintiff preferred the present appeal to His Majesty in Council against the said decree of the Chief Court.

1. (1917) I.L.R. 40 M. 1118. 2. (1888) I.L.R. 11 A 100.
3. (1920) I.L.R. 1 Lah. 376.

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Lord Atkin.

Dunne, K.C. and *Wallach* for appellant.

De Gruyther, K.C. and *Dube* for respondents.

30th June, 1930. Their Lordships' judgment was delivered by

Lord Atkin.—This is a case which involves a question of the inheritance of a property in Oudh, and it involves an important question as to the position of heirs of an ancestor who renounced his original religion of Hinduism and became a Muhammadan. The ancestor in question was a man named Jagardeo Singh, who was in 1843, at the date of his conversion to Muhammadanism, a member of an undivided Hindu family tracing their descent, so far as is necessary to this case, from a common ancestor, Babu Sangram Shah. Jagardeo Singh, as stated, was converted to Muhammadanism in 1843 and he died in 1844. He left two sons and two daughters, or at any rate he had two sons and two daughters, and one of the sons, who is the grandfather of the present defendants, was Agha Hasan Khan, who married and had a daughter, who married and whose children are the three defendants, 1, 2 and 3, in this case. On the death of the widow of Agha Hasan Khan the three children came into possession of the property which had belonged to Jagardeo Singh and had descended in that way to their grandfather. The property is claimed in this action by one Babu Mitar Sen Singh, who is a descendant in the sixth generation of Babu Sangram Shah and would be the proper heir and would succeed to this property in accordance with Hindu law, on the footing that a custom prevailed in the family, as is alleged, which excludes females from inheritance. That custom has not gone to proof in this particular case. Its existence has been assumed for the purpose of the case, and their Lordships will so deal with the matter.

The plaintiff founds his claim upon the Caste Disabilities Removal Act of 1850, Act XXI of 1850, which applied to Oudh at this time. It is important to bear in mind the words of the Act. It first of all recites section 9 of Reg. VII of 1832 of the Bengal Code. Then it says:

"'Wherever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion: or where one or more of the parties to the suit shall not be either of the Muhammadan or the Hindu persuasions; the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled'; and whereas it will be beneficial to extend the principle of that enactment throughout the Territories subject to the government of the East India Company, it is enacted as follows."

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The enacting part is contained in one clause, Clause 1:

"So much of any law or usage now in force within the Territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as Law in the Courts of the East India Company and in the Courts established by Royal Charter within the said Territories."

It has to be remembered that the law of succession in the case of a Hindu or a Muhammadan depends upon their own personal law: it depends upon the law of their religion, and there can be no question but that in this case, apart from the operation of this Act, inasmuch as the father of these children was in fact a Muhammadan, these children would be the proper heirs according to Muhammadan law, and, even if there was a custom which excluded the daughters, nevertheless the Muhammadan law would in itself prevent a Hindu from succeeding as heir; and therefore, if the personal law of Agha Hasan Khan, the grandfather of these children, prevailed, then the plaintiff would have failed to establish his case. That is the only point which their Lordships have to determine, and therefore the plaintiff relies upon this Act and says that Jagardeo Singh renounced his religion but nevertheless the plaintiff was not to have his rights of inheritance impaired by reason of Jagardeo Singh having renounced the Hindu religion, and he claims therefore that, as he was a Hindu, he was entitled to establish his right of inheritance in accordance with the Hindu law.

There have been, no doubt, two conflicting lines of decisions on the construction of this Act. One has taken the wide view which is sought to be put upon this Act by the plaintiff in this case, and it cannot be better stated than in the judgment of Sir John Edge, then Chief Justice of Allahabad, in the case of *Bhagwant Singh and others* v. *Kallu*[2]. One passage only need be referred to in order to show how the broad construction relied upon by the plaintiff is expressed. Sir John Edge says at page 104:

"The latter portion of the section, in my opinion, protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste"

The consequence of that would be that the plaintiff in this case would succeed in establishing his claim. It would have very far-reaching consequences if one tried to apply that prin-

2 (1888) I.L.R. 11 A. 100.

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ciple to ordinary cases, because it would apparently mean that, if a Hindu becomes a Muhammadan, then the descendants of that Muhammadan throughout the ensuing generations, without any limit, would always derive their succession under the Hindu law of succession and not under the Muhammadan law of succession. It is unnecessary for their Lordships to discuss the far-reaching effects of that decision. On the other hand, there has been another line of decisions which is exemplified by the case of *Vaithilinga Odayar* v. *Ayyathorai Odayar*[1] which takes the narrower view, the view which, in their Lordships' opinion is the correct view, namely, that this section in terms only applies to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. It is intended to protect such a person from losing any right of property or of succeeding as heir. It appears to their Lordships that when the Act is looked at that is the only reasonable construction that can be put upon it. The first limb of this section says "So much of any law . . . . as inflicts on any person forfeiture of rights or property,"—and Sir John Edge himself took the view that that part of the clause only applied to the person who renounced:—the second limb proceeds "or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing."—Now it is perfectly true that the words "his or her" are not so easy to apply, because there is not a person expressed in the Act who is represented by "his or her," but it seems to their Lordships to be plain that the words "or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing" should be read "any right of inheritance of any person by reason of his or her renouncing." The clause is given a simple meaning by this construction and their Lordships think that that is the correct view. In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. It may, of course, work hardly to some extent upon expectant heirs, especially if the expectant heirs are the children and perhaps the unconverted children of the ancestor who does in fact change his religion, but, after all, it inflicts no more hardship in their case than in any other case where the ancestor has changed the law of succession, for instance, by acquiring a different domicile, and their Lordships do not

1 (1917) I L.R. 40 M 1118

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find it necessary to consider any questions of hardship that may arise. They will certainly, in their Lordships' view, be outweighed by the immense difficulties that would follow if the wider view were to prevail. Their Lordships are definitely of opinion that the construction which was adopted by Sir John Edge was not the right construction and that case and any cases that followed it must be overruled so far as the construction of this Act is concerned.

Their Lordships therefore think that the opinion of the Chief Court and the judgment of the Chief Judge were perfectly correct. The reasoning appears to their Lordships to be well founded and they have come to the conclusion that this appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Watkins and Hunter.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

V. Narasimha Aiyangar, Official Liquidator of the City Hygienic Milk Supply Co., Ltd. .. *Appellant** (*Applicant*)

v. (*Applicant*)

The Official Assignee of Madras representing D. Sadasiva Rao, an insolvent and others .. *Respondents.*

Narasimha Aiyangar v. The Official Assignee of Madras.

Company—Liquidation—Misfeasance application taken out by Official Liquidator against Directors—Plea of limitation—Directors whether express trustees—Date of misfeasance as starting point—Limitation Act (IX of 1908), S. 10, Arts. 36 and 120—Companies Act (VII of 1913), S. 235.

A joint-stock company was directed to be wound up by an order of Court, dated 13th September, 1922. In 1923, as a result of proceedings instituted by the Official Liquidator, the Official Referee was directed to examine the management of the Company's affairs by the Directors. On 12th September, 1928, the Official Liquidator took out an application under S. 235 of the Companies Act, 1913, against some of the Directors claiming to recover compensation in respect of their acts of misfeasance. An objection having been taken that the application was barred by limitation,

Held, that the Directors of the Company were not express trustees within the meaning of S. 10 of the Limitation Act, 1908, and could consequently plead the bar of limitation.

Kathiawar Trading Co., Ltd. v. *Virchand Dipchand,* (1893) I.L.R. 18 Bom. 119, followed.

Decision of Beasley, J. (as he then was) affirmed.

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*O.S.A. No. 14 of 1929. 17th January, 1930.

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Dictum of Schwabe, C.J., in *Kishtappa Chetty* v. *Lakshmi Ammal*, (1923) 44 M.L.J. 431, commented on.

Held, further, that the application was time barred, whether Art. 36 or Art. 120 applied to the case, because the starting point of limitation for taking out the application was the date of the misfeasance and not the date of the winding-up order passed by the Court.

Bhim Singh v. *Liquidator, Union Bank of India*, (1926) I.L.R. 8 L. 167, followed.

In the matter of the *Union Bank, Allahabad, Ltd.*, (1925) I.L.R. 47 A. 669, not followed.

Decision of Beasley, J. (as he then was) affirmed.

On appeal from the judgment and order of the Honourable Mr. Justice Beasley, dated 11th December, 1928, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 62 of 1922, In the matter of the Indian Companies Act and In the matter of the City Hygienic Milk Supply Company, Limited.

The facts of the case are set out in the following judgment* of Beasley, J. (as he then was), which also contains a discussion of the questions of law arising in the case:—

Beasley, J.—This Company was ordered to be wound up by the Court by an order, dated the 13th September, 1922. On the 29th March, 1923, the then Official Liquidator made an application for the public examination of some of the Directors and Officers of the Company regarding their management of its affairs and by an order of this Court, dated the 10th of April, 1923, the Official Referee was directed to conduct that examination and, as the result of it, the present misfeasance summons was taken out on the 12th September of this year. The matter was argued before me on a preliminary objection taken on behalf of the respondents, namely that the application in this summons is barred by limitation.

There are two questions to be decided: firstly, which article, if any, of the Limitation Act applies to this case, Art. 36 or Art. 120, and secondly, what is the starting point of limitation. With regard to the latter question it is contended by Mr. V. Radhakrishnayya on behalf of the Official Liquidator that time begins to run from the date of the winding-up order, namely, 13th September, 1922, whereas the contention of the respondents is that the starting point of limitation is the date of the acts of misfeasance alleged in the summons against the respondents. If the latter contention is correct, then it is immaterial whether Art. 36 or Art. 120 applies, because in either case the application is barred. Of these two articles Art. 120 gives the longer period of limitation, namely six years and admittedly the summons was taken out more

*O.P. No. 62 of 1922. 11th December, 1928.

Narasimha Aiyangar v. The Official Assignee of Madras.

than six years from the dates of any of the alleged misfeasances. Mr. Radhakrishnayya also contends that directors of companies are not protected by the Limitation Act at all as they are in his submission express trustees and that under section 10 of the Limitation Act as against such persons no suits are barred by any length of time. With this latter submission I think it will be more convenient to deal first.

But before doing so I will refer to section 235 of the Indian Companies Act of 1913, sub-section (3), which provides as follows:—

"The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit."

This sub-section appeared for the first time in this Act and was not in the older Indian Companies Act. It was, therefore, inserted in this Act for a purpose, Mr. Radhakrishnayya contending that it was in order to deprive directors of the protection of the defence of limitation, and he argues that as the section includes promoters, managers, liquidators or officers as well as directors, the sections which provide for a period of limitation were intended to be applied to those persons and that in the case of directors it was section 10, which was intended to be applied to them. He relies on a number of decisions. In *Ramaswami* v. *Sriramulu Chetti*[1] it was held by Sir Arthur Collins, C.J., and Parker, J., first of all that Art. 36 of the Limitation Act did not apply to the corresponding section in the Indian Companies Act of 1882, because it was an application and not a suit and a clear distinction was drawn in the Limitation Act between suits, appeals and applications. This decision is no longer good law because it was a decision under the old Act, whereas under the present Act section 235, sub-section (3) of the Indian Limitation Act (I of 1908) is to be applied to an application under that section as if such application were a suit. They further decided that the Act complained of was a breach of trust and relied on section 165 of the English Companies Act of 1862, the corresponding section of the Indian Companies Act of 1882, under which that application was made, and cases upon the point in which it was held that the relationship of trustees and *cestui que trust* subsist between directors of Joint Stock Companies and the shareholders. Some of these cases were relied upon by Mr. Radhakrishnayya and I shall deal with them later.

There have been a number of decisions in the English Courts in which the position of directors of Companies has been discussed. In 1888 Kay, J., in In re *Faure Electric Accumulator Company*[2] distinguishes between director of Joint Stock Companies and ordinary trustees in the following words:

1. (1896) I.L.R. 19 M. 149. 2. (1888) 40 Ch.D. 141 at 150, 151.

"These questions involve a consideration of what is the real position of the directors of a joint-stock trading company. With respect to the capital of the company which is under their management, it has been said that they are '*quasi*-trustees' for the company: *Flitcroft's case*[3]. In that and other respects they are 'to a certain extent, trustees' (Lindley on Partnership, 4th Edn, page 587). In the language of Lord Romilly, in *York and North Midland Railway Company* v. *Hudson*[4], 'the directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely' They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will One obvious distinction is that the property of the company is not legally vested in them. Another and perhaps still broader difference is that they are the managing agents of a trading association, and such control as they have over its property, and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house to whom the control of its property and very large powers for the management of its business are confided; but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control except the action of the shareholders of the company. However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent. In In re *Forest of Dean Coal Mining Company*,[5] (a case relied upon by Mr. Radhakrishnayya), Sir George Jessel, M.R., said: 'Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners It does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it . . . . . . They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners."

At page 152 Kay, J., refers to *Marsetti's case*[6], in which James, L.J., said:

"A director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees."

I do not propose to refer to anything else in the judgment of Kay, J. I think that it is a very strong case against Mr. Radhakrishnayya and seems to me to be very strong authority for the contention that directors are not express trustees. They are very far from being express trustees and unless they are, they are not within the provisions of section 10 of the Limitation Act.

3. (1882) 21 Ch.D. 519, 534.
4. (1845) 16 Beav. 485, 491.
5. (1878) 10 Ch.D. 450 at 453.
6. 28 W.R. 541 at 542, 543.

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In a previous case in 1882, *Flitcroft's case*[3] referred to by Kay, J., Brett, L.J., said with regard to directors they are trustees for the company and not for the individual shareholders and then goes on to say:

"There are persons who may be made liable under section 165, (which correspond to section 235 of the Indian Companies Act) without having been guilty of a breach of trust; but where the person charged under that section is a trustee, the act which brings him within the section is a breach of trust. That being so, no Statute of Limitations nor any bar by analogy to the statute can be relied on."

And Cotton, L.J., at page 537 says:

"The Statute of Limitations can in no way apply to a case like the present, for the ground of our decision against the directors is that they have misapplied funds as to which they stood in the position of trustees."

In In re *Brazilian Rubber Plantations and Estates, Limited*[7] Neville, J., quoting Lord Macnaghten in *Cavendish Bentinck* v. *Fenn*[8], says:

"Lord Macnaghten there says that misfeasance under the section must be misfeasance in the nature of a breach of trust resulting in a loss to the company. Breach of trust there, I think, is intended to include breach of duty."

In the case referred to by Neville, J. (*Cavendish Bentinck* v. *Fenn*[8]) Lord Macnaghten at page 669 said:

"The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company."

In In re *Lands Allotment Company*[9] Lord Lindley at p. 631 made some most important observations upon the subject which are as follows:

"Then comes the question whether they are protected by the Statute of Limitations which is applicable to trustees, and the learned Judge has held that they are, and, I confess, it appears to me that he is obviously right in the construction which he puts upon that statute. Just consider what we are asked to do here. We are really asked to put ourselves in a most grotesque position. We are asked to say that the directors are liable for these moneys upon the footing that they committed a breach of trust, but that they are not entitled to the benefit of the Statute of Limitations which was passed for the benefit of trustees. I cannot be party to any decision so supremely absurd. Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint-stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to

3. (1882) 21 Ch.D. 519.
7. (1911) 1 Ch. 425.
8. (1887) 12 A.C. 652.
9. (1894) 1 Ch. D. 616.

the benefit of the old Statute of Limitations because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees. Then, when the Legislature passed an Act of Parliament—the Trustee Act of 1888—protecting trustees against actions for breaches of trust, how can it be with any reason said that directors are not to have the benefit of this statute? I cannot go that length I am satisfied that the statute does apply. Let us look at the words of it. The first section of the Act with which we are dealing says thus: 'For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.' "

He then refers to *Soar* v. *Ashwell*[10], in which Bowen, L.J., considered that directors are express trustees of money which they have control of. But under the English Act a period of limitation of six years is provided. Here, if the directors are within section 10 of the Limitation Act, no period of limitation can protect them. In my view they cannot be considered to be express trustees within the provisions of that section which moreover deals only with suits for the purpose of following property or the proceeds of it in the hands of trustees for an account of such property. In my opinion, therefore, directors of companies are entitled to the protection of the Limitation Act.

But before considering which article is applicable to them I propose to deal with the question of the starting point of limitation. It is not suggested that any other articles except Arts. 36 and 120 can apply. If Art. 36 applies, the starting point is when the misfeasance therein mentioned takes place; if Art. 120, the starting point is when the right to sue accrues, and Mr. Radhakrishnayya argues, that the right to sue under Art. 120 did not accrue until the winding-up of the company and the appointment of the liquidator, but in a case to which I have already referred, namely, *Cavendish Bentinck* v. *Fenn*[8], Lord Macnaghten said that the corresponding section of the English Act created no new offence, gave no new rights but only provided a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity; and this decision of Lord Macnaghten has been frequently referred to in other English cases. In the *City Equitable Fire Insurance Company's case*,[11] Pollock, M.R., referred to section 215 of the Companies (Consolidation) Act, 1908, and said:

"Now the claim is brought in accordance with the procedure which is rendered available by section 215 of the Companies (Consolidation) Act, 1908, and as an argument was presented to us for which some foundation could be suggested based in substance upon section 215, I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abun-

8. (1887) 12 A.C. 652.
10. (1893) 2 Q.B. 390.
11. (1925) 1 Ch. 407 at 507.

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dantly shown by *Coventry and Dixon's* case[12]; In re *Brasilian Rubber Plantations and Estates, Limited*[7] and *Cavendish Bentinck* v. *Fenn*[8]."

And Sargant, L.J., in In re *City Equitable Fire Insurance Co.*[11] says that

"Section 215 of the Companies (Consolidation) Act, 1908, which corresponds in almost precise words with the old section 165 of the Act of 1862, is a procedure section only, and merely provides a summary remedy for enforcing in the liquidation of a company such liabilities as might have been enforced by the company itself, or by its liquidator, by means of an ordinary action."

In *Coventry and Dixon's* case[12], James, L.J., at page 670 said:

"In this case we have only to apply section 165. I am of opinion that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts. In order to enable the Court to apply that section, the liquidator, as it seems to me, must shew something which would have been the ground of an action by the company if it had not been wound up."

Great reliance is placed by Mr. Radhakrishnayya upon In re *National Funds Assurance Company*[13]. In that case on page 125 Jessel, M.R., said:

"It does not appear to me to be necessary to inquire what the position of a liquidator suing third persons or suing shareholders may be All I have to do is to obey the Act of Parliament, which is clear, plain, and unambiguous in its terms Therefore, I think the decisions which have been cited have no application to this part of the case; and I think also that it is plain, after *Webb* v *Whiffin*[14], and other decisions of the House of Lords, that after the winding-up of a company new rights are given by the Act of Parliament—rights which did not exist before the winding-up, and rights which can be enforced only under the winding-up"

This statement, he argued, gives the Official Liquidator a new right and that the right of action only accrues when he is appointed Official Liquidator or at any rate at the winding-up of the Company. But it has been pointed out in the cases to which I have referred that the corresponding section in the English Companies Act is merely one of procedure and gives no new right to the Official Liquidators. I think it must be clear that what the Official Liquidator has at his disposal is a summary method of enforcing such rights as the Company could have enforced or shareholders could have enforced before winding-up of the Company and no more. If proceedings had been taken against the Directors before the winding-up by the shareholders or by some others of the Directors, the right of action would have accrued to the Company or those other persons, when the misfeasance took place, and all that, in my opinion, the Official Liquidator has in those rights, and Directors of Companies are entitled to claim that the starting point of limitation is the alleged act or acts of

7. (1911) 1 Ch. 425
8 (1887) 12 A.C. 652, 669
11. (1925) 1 Ch. 407 at 527.
12. (1880) 14 Ch D. 660
13. (1878) 10 Ch.D. 118
14. L.R. (1872) 5 H.L. 711.

misfeasance in the same way that they would be able to set up that contention in an action before the winding-up of the Company. I arrive at this conclusion with great reluctance because I am of opinion that in this country it must necessarily take a very long time before the Official Liquidator appointed in a winding-up is able to bring to light acts of misfeasance on the part of the Company's Directors.

As I have held that the starting point of limitation was the date or dates of the alleged acts of misfeasance, it is immaterial whether Art. 36 or Art. 120 applies to this case, as in either case the application is barred by limitation, and I content myself with saying that in my view the decision of the Lahore High Court in *Bhim Singh* v. *The Official Liquidator, Union Bank of India*[15] is correct and that the decision of Walsh, J., in In the matter of the *Union Bank, Allahabad, Ltd.*[16] is not correct. In the Lahore case it was held, following English decisions, that section 235 of the Indian Companies Act does not create new rights but merely provides a summary remedy of enforcing existing rights, which apart from that section might have been vindicated by means of a suit and that therefore an application under that section made more than two years after the act of misfeasance complained of is alleged to have taken place, is barred by Art. 36 of the Limitation Act. Following the Lahore case I must hold that this application is barred by limitation. I am very sorry to have to do so, because, in my view, if there ever was a case which required the fullest investigation it is this one. Allegations made against the Directors, the respondents to this application, are very serious ones, although they do not amount to allegations of fraud.

This application is dismissed without costs, and the Official Liquidator will take his taxed costs out of the assets of the Company.

Against this judgment the Official Liquidator preferred an appeal.

V. Radhakrishnayya for appellant.

T. M. Krishnaswami Aiyar, K. Narasimha Aiyar, S. E. Sankara Aiyar, N. Sivaramakrishna Aiyar, S. Parthasarathi and *V. K. Thiruvenkatachari* for respondents.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—This is an appeal against an order of our brother Beasley, J., as he then was, dismissing an application of the Official Liquidator of the City Hygienic Milk Supply Co., Ltd., under section 235 of the Indian Companies Act for an order compelling the Directors of the Company to pay certain amounts by way of compensation in respect of their

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15. (1926) I.L.R. 8 Lah. 167. 16. (1925) I.L.R. 47 A. 669.

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acts of misfeasance, etc. Two points were raised before the learned Judge and both were decided against the applicant. The Official Liquidator appeals.

In appeal the two points that arise are: (1) Whether Directors of Companies under the Indian Companies Act are trustees for the purpose of section 10 of the Limitation Act; and (2) if they are not trustees, from what date does limitation run.

Taking up the first point, it is now clear that, even in England in spite of occasional use of loose expressions to the contrary, it is now settled that Directors of Companies are not trustees. In In re *Forest of Dean Coal Mining Company*,[1] Jessel, M.R., said at page 451:

"Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners"

and at page 453:

"They are no doubt trustees of assets which have come into their hands, or which are under their control but they are not trustees of a debt due to the company."

In *Flitcroft's case*,[2] Bacon, V.C., no doubt said:

"That the relationship of trustee and *cestui que trust* subsists between the directors of joint stock companies and the shareholders, I do not entertain the slightest doubt."

But this statement is inconsistent with the remarks of Lords Justices in the Court of Appeal and with later special judicial opinions. On appeal in the same case Jessel, M.R., said: "If directors who are *quasi* trustees for the company, etc." Brett, L.J., said: "They are trustees for the company not for the individual shareholders." But even this statement is too wide. Cotton, L.J., said: "They have misapplied funds as to which they stood in the *position of trustees*." In In re *Faure Electric Accumulator Company*[3], Kay, J., says:

"They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will. One obvious distinction is that the property of the company is not legally vested in them, etc."

In In re *Lands Allotment Company*[4] Kay, L.J., says at page 639:

"As directors they are not trustees at all. They are only trustees *qua* the particular property which is put into their hands or under their control, etc."

Lindley, L. J., says: "Although directors are not properly speaking trustees, etc." In In re *City Equitable Fire Insurance Company*,[5] Romer, J., observes: "To

1. (1878) 10 Ch.D. 450. 2. (1882) 21 Ch.D. 519.
3. (1888) 40 Ch. D. 141 at 150, 151.
4. (1894) 1 Ch.D. 616. 5. (1925) 1 Ch. 407.

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say that directors are trustees is a wholly misleading statement." It is unnecessary to refer to English decisions at greater length, for all that we are concerned with is whether they are trustees for the purpose of section 10 of the Limitation Act.

In *Kathiawar Trading Company, Limited* v. *Virchand Dipchand*[6] it was held by Sargent, C.J., and Bayley, J., that Directors of Companies are not trustees in whom the property of the Companies has become vested in trust for any specific purpose. I entirely agree with this decision. It is contended that the purposes of the Company are specific purposes within the meaning of the section. The purposes of the Company are too wide, and far from being specific, one would say they are very general purposes, and even then it is doubtful whether it can be said that the property of the Company is vested in the Directors. Two decisions have been referred to by the learned advocate for the appellant as somewhat weakening the decision in *Kathiawar Trading Company, Limited* v. *Virchand Dipchand*[6]. These are *Kishtappa Chetty* v. *Lakshmi Ammal*[7] and *Pachaiyappa Chetti* v. *Sivakami Ammal*[8]. I have nothing to say as to the actual decisions in these cases, but I think that the statement of Schwabe, C.J., in the former of these cases, namely, wherever there is control over money there is an express trust, a statement probably based upon the observations of Lord Esher, M.R., in *Soar* v. *Ashwell*[9], must be understood in the light of the other judgments of the Court of Appeal in that case which show that "control" (in Lord Esher's judgment) must be regarded as synonymous with vesting. As to the decision in *Pachaiyappa Chetti* v. *Sivakami Ammal*[8], the facts are very plain and there is an express trust. I do not think that the remarks in these decisions affect the decision in *Kathiawar Trading Co., Ltd.* v. *Virchand Dipchand*[6] with which I entirely agree. It follows therefore that Directors can plead limitation.

Coming now to the second point, the question really turns upon whether entirely new rights with a new cause of action arise on the winding up of a Company. That, for certain purposes, new rights may be conferred by the winding up of a Company, there can be no doubt. One such well-known case is the liability to pay calls as a contributory. Both English and Indian authorities are very clear on this matter; but it does not follow from this that the right of a liquidator under sec-

6. (1893) I.L.R. 18 B. 119.
7. (1923) 44 M.L.J. 431.
8. (1925) 49 M.L.J. 468.
9. (1893) 2 Q.B. 390.

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tion 235 is a case of a new right accruing by reason of the winding up. The corresponding section of the English Act of 1862 is section 165 and it has been held by the House of Lords in *Cavendish Bentinck* v. *Fenn*[10], that that section creates no new rights but only provides a summary and efficient remedy. So also in *The City Equitable Fire Insurance Company's* case,[11] Pollock, M.R., said:

"That section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abundantly shown by the *Coventry and Dixon's* case[12], etc."

In the last case James, L.J., observed:

"I am of opinion that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts."

So far as contributories are concerned, we have got a specific section fixing the time when the amount is payable. Section 159 says that a contributory shall pay at the time when calls are made for enforcing liability. Naturally limitation runs from the time when calls are so made. We have no corresponding section in the case of liability for misfeasance under section 235. On this matter two decisions of two Indian High Courts are in conflict—the decision in In the matter of the *Union Bank, Allahabad, Ltd.*[13] and the decision in *Bhim Singh* v. *Liquidator, Union Bank of India*[14], which follows an earlier decision of the Punjab High Court. Agreeing with the learned Trial Judge, I think we should prefer to follow the decision of the Punjab High Court.

If the cause of action arises from the time when the misfeasance was committed, it is admitted that the application is barred whether Art. 36 or 120 applies. It is unnecessary to consider that question in this case.

Mr. V. K. Thiruvenkatachariar appearing for one of the Directors argued that it is not all misfeasance for which Directors may be liable under section 235. This might be so; but it is unnecessary to consider this point in this appeal.

The appeal fails and is dismissed with costs.

The learned Judge has given leave to the Official Liquidator to appeal and has authorized him to incur the expenses of the appeals from the assets of the Company and we need not pass

10. (1887) 12 A.C. 652.
11. (1925) 1 Ch 407.
12. (1880) 14 Ch.D. 660.
13. (1925) I.L.R. 47 A. 669.
14. (1926) I.L.R. 8 Lah. 167.

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any further order as we agree with the discretion exercised by him. There will be one set of costs to the respondents.

Cornish, J.—Section 10 of the Limitation Act is founded upon the equitable doctrine explained by Bowen, L.J., in *Soar* v. *Ashwell*[9], that "time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust."

In my judgment it is settled by *Kathiawar Trading Co., Ltd.* v. *Virchand Dipchand*[6] and the English authorities there cited that a director of a joint-stock company is not, in the language of section 10, "a person in whom property has become vested in trust for any specific purpose". And a series of later English authorities confirms this view of the position of a Director. In *Flitcroft's* case[2], Jessel, M.R., described Directors as *quasi*-trustees. In *Soar* v. *Ashwell*[9] Kay, L.J., observed:

> "Generally speaking, a person who is not the appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee."

And in In re *Lands Allotment Co.*[4] Lindley, L.J., said:

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees. . . . . ."

Lord Justice Kay, in In re *Faure Electric Accumulator Company*[3], has pointed out an obvious distinction between directors and express trustees, namely, that the property of the company is not legally vested in the directors. That the property of the company does not become "vested" in the directors by reason of such property being under their control is also made clear by the authorities referred to in *Kathiawar Trading Co., Ltd.* v. *Virchand Dipchand*[6]. The dictum of Schwabe, C.J., in *Kishtappa Chetty* v. *Lakshmi Ammal*[7], that the word "vested" in section 10 of the Limitation Act "does not mean anything more than properly having control of the property" is opposed to those authorities and appears to have been expressed without those authorities having been brought to his notice. Nor can it be said that the entrustment of the

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2 (1882) 21 Ch D. 519 at 534.
3. (1888) 40 Ch D. 141 at 150.
4. (1894) 1 Ch D. 616.
6. (1893) I.L.R. 18 B. 119.
7 (1923) 44 M.L.J. 431.
9. (1893) 2 Q.B. 390 at 400.

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Company's moneys to the Directors for the general purpose of carrying on the business of the Company is an entrustment for a specific purpose within the section. In *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*[15] their Lordships of the Judicial Committee discussing a Limitation Ordinance similar in terms to the language of section 10 of the Indian Act stated:

"A specific purpose, within the meaning of section 10, must be a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed"

It is clear upon these authorities that the Directors in the matter before us cannot be regarded as express trustees, and, if they are not express trustees, section 10 of the Limitation Act does not operate to deprive them of their right to rely on any available provision or article in the Act as a bar to the liquidator's claim.

The question then is, whether a bar is furnished either by Art. 36 or Art. 120 of the Act, these being the only articles which are suggested as having any application to the case. Admittedly, if the starting point of limitation is the alleged acts of misfeasance or breach of trust by the Directors, the remedy would be barred whichever article governed it. But it has been contended by the learned counsel for the liquidator that the winding-up order is the starting point of the liquidator's right of applying to the Court under section 235 (1) of the Indian Companies Act (VII of 1913). Reliance for this proposition is placed on In the matter of the *Union Bank, Allahabad, Limited*[16], where this view prevailed, and the reasons for it are given by Mukerji, J., at p. 693 of the judgment as follows:—

"The claim is by the liquidator who had no existence at the dates on which the amounts claimed are alleged to have been mis-spent If the liquidator is given permission by the law to claim these moneys, certainly it would be unfair and unjust to say that the claim became time-barred before he came into existence."

But, with all respect, it may be pointed out that the right of application to the Court given by section 235 is not confined to the liquidator; it is given to a creditor and to contributories. And if creditors of a company or the shareholders, who are expected to be alive to their interests, choose to allow remedies which might be open to them in respect of losses attributable to

15. (1922) 1 A.C 120 at 126. 16 (1925) I.L.R 47 A 669

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misfeasance by the directors to become time-barred, it seems to me that neither fairness nor justice requires that after the Company has been ordered to be wound-up the liquidator shall have the right to enforce those remedies against the Directors for the benefit of the creditors and contributories. It is, however, unprofitable to speculate upon the reasonableness of this particular aspect of section 235, because it has been most authoritatively settled that the corresponding provision in section 215 of the English Act, the Companies (Consolidation) Act, 1908, is a procedure section only and gives no new rights. *See* In re *City Equitable Fire Insurance Co.*[5] Sir E. M. Pollock, M.R., says with reference to this section:

"I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights"

To the same effect is the judgment of Sargant, L.J., at p. 527. This ruling is decisive of the question and has been regarded as conclusive of it by a Bench of the Lahore Court in *Bhim Singh* v. *Liquidator, Union Bank of India*[14]. In my opinion, therefore, it is impossible to hold, that the liquidator acquired a new right from the winding-up order to enforce against the Directors a claim which had already become time-barred, whether under Art. 36 or Art. 120 of the Limitation Act. I think that the judgment of Mr. Justice Beasley should be upheld and that this appeal fails.

I agree to the order of costs proposed by my learned brother.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

A. S. Gnanaprakasam Pillai .. *Plaintiff**

v.

F. S. Vaz .. *Defendant.*

Gnanaprakasam Pillai v. Vaz.

Transfer of Property Act (IV of 1882), Ss. 106, 107, 110 and 116—Agreement of lease—Unregistered—Whether admissible in evidence—Indian Registration Act, Ss 17 (1) (d) and 49—Notice to quit—"Calendar month"—Meaning of

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5. (1925) 1 Ch. 407 at 507.

14. (1926) I.L.R. 8 Lah. 167.

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sam Pillai
v.
Vaz.

According to the terms of a written but unregistered deed of lease, the plaintiff should let and the defendant should take a dwelling-house "from the 1st of December, 1924 to the 1st of January, 1925". The tenancy was to be determined by either party giving to the other of them subsequent to the 1st of January, 1925, fifteen days' notice in writing expiring with the calendar month. On the 15th September, 1930, the notice to quit was issued to the defendant asking him to take notice that he was thereby called upon to vacate and deliver possession "on the fore-noon of the 1st of October, 1930." On the questions whether the lease in writing was admissible in evidence and whether the notice to quit was bad,

Held, (1) that the deed of lease in question not being of the description mentioned in S. 17 of the Indian Registration Act, the Act does not stand in the way of its being received in evidence *Rama Sahu* v. *Gowro Ratho*, (1920) I.L.R. 44 M. 55: 39 M.L.J. 639 (F.B.), followed;

(2) that giving it a rational interpretation, the notice to quit in this case was a good notice.

Sidebotham v. *Holland,* (1895) 1 Q.B. 378 (C.A.); *Harvey* v. *Copeland,* (1892) 30 L.R. (Ireland) 412, *Harihar Banerji* v. *Ramsashi Roy,* (1918) L.R 45 I.A. 222: I.L.R. 46 C. 458: 35 M.L.J. 707 (P.C.), followed.

A "calendar month" means, according to the Oxford Dictionary, one of the twelve months into which the year is divided according to the calendar, also the space of time from any day of any such month to the corresponding day of the next, as opposed to a lunar month of four weeks.

A. Suryanarayaniah and *A. Ramachandriah* for plaintiff.

George Joseph for *K. Kuppuswami* for defendant.

The Court delivered the following

JUDGMENT.—The question raised is an important one and relates to the sufficiency of a notice to quit. The plaintiff's counsel tells me that, although in the ordinary course he would have filed this suit in the City Civil Court, he has chosen this forum anticipating that the defendant would raise the point he has now done. The terms of the lease are set forth in a writing, dated the 1st of December, 1924. It says:

"The landlord lets and the tenant takes the dwelling-house . . . *from the 1st of December,* 1924 *to the 1st of January,* 1925, and thereafter unless and until the tenancy should be determined by a notice as hereinafter provided."

The only other paragraph which is relevant reads thus:

"The tenancy may be determined by either party giving to the other of them subsequent to the 1st January, 1925, fifteen days' notice in writing expiring with the calendar month."

This agreement has not been registered and the first question that arises is whether it is admissible in evidence. Section 107 of the Transfer of Property Act provides;

"A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

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The lease in question being for a year only, it is the second paragraph that applies. As both parties agree that there is a valid lease, I must assume that it was affected by an oral agreement accompanied by possession. Under the Transfer of Property Act, a registered instrument is not required to bring into existence such a lease as the one before me. A valid lease having come into existence independent of the document, can it be received in evidence or not, for the purpose of finding out the terms of the lease? To answer this question, we must advert not to the Transfer of Property Act, which deals with transactions, but to the Registration Act, which deals with documents. Section 49 of the latter Act forbids any document being received in evidence which contravenes the terms of section 17. Under the last mentioned section, only certain leases are compulsorily registrable, namely, those from year to year, or for any term exceeding one year, or reserving a yearly rent. The agreement not being of this description, the Registration Act does not stand in the way of its being received in evidence. This view receives support from *Rama Sahu* v. *Gowro Ratho*.[1]

The notice to quit is dated the 15th September, 1930, and is in the following terms:

"Take notice that you are hereby called upon to vacate and deliver possession of our bungalow . . . . on the *forenoon of the 1st October*, 1930."

For the defence, two contentions are raised in the alternative: first, that it is too long a notice; second, that it is too short a one. Let me deal with the first contention. It is put thus. The tenancy under the agreement is to commence from the 1st December, 1924. Section 110 of the Transfer of Property Act says, that where the time limited by a lease is expressed as commencing from a particular day, in computing that time, such day shall be excluded. Read in the light of this section, the lease commences on 2nd December, 1924 and terminates on 1st January, 1925 The defendant's counsel then argues, that on the termination of the period fixed, a new tenancy commences on the 2nd January, 1925. The month of the tenancy is therefore from the 2nd January to the 1st February, 1925. This must be supposed to go on indefinitely. The period

1. (1920) I.L.R. 44 M. 55: 39 M.L.J. 639 (F.B.).

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that matters, therefore, is from the 2nd of a month to the 1st of the succeeding month. The next step in the argument is, that this is, what the parties meant, by the expression "the calendar month" in the agreement. If this be so, the notice to quit is bad, terminating the tenancy as it does, not *on the expiry* of the 1st October *but on the forenoon of that day*: in other words, the notice is too short by about 12 hours. I am not prepared to accept this contention. A "calendar month" means, according to the Oxford Dictionary, one of the twelve months into which the year is divided according to the calendar; also the space of time from any day of any such month to the corresponding day of the next, as opposed to a lunar month of four weeks. There can be no doubt that the parties understood the expression in the former sense. In this case the original lease came to an end on the 1st January, 1925. Thereafter the parties dealt with each other on the footing that the rent was to be paid and received, for an English calendar month, that is to say, for January or February and so on.

Granting that the term "calendar month" is used in the sense I have ascribed to it, the question still arises, is the notice to quit a good or a bad notice? Mr. George Joseph, the defendant's counsel, contends that it is bad, because it terminat the tenancy on the forenoon of the 1st October, whereas it ough to have terminated it on the midnight of the 30th September; in other words, that the notice is too long by a few hours. This contention is strictly correct, but the question is, is the suit liable to be dismissed on that ground? On this point, *Sidebotham* v. *Holland*[2] is a very useful case. By an agreement in writing the plaintiff agreed to let a house to the defendant as yearly tenant commencing on the 19th May, 1890. On November 17, 1893, the plaintiff gave the defendant notice calling upon him to quit on May 19 following. It was held that a notice to quit on May 18 would have been good, but nevertheless that the notice to quit on May 19 must not be treated as bad. Lindley, L.J, with whom Lord Halsbury concurred, after stating that one year from the 19th would expire at midnight of the 18th of the next May, observes as follows:

"But, although a half-year's notice to quit on the 18th would be correct, it does not follow that a notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not. I have looked at all the decisions which were referred to in the argument and at many more, and I can

2. (1895) 1 Q.B. 378 (C.A.).

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find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case."

It is obvious that, if notice to quit on the 18th is correct, notice to quit on the 19th is strictly speaking bad. But why does the learned Lord Justice say it is not bad? I repeat his very words:

"The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

In another place he remarks that the distinction is far too subtle for practical use. I am tempted to extract the following passage from the judgment of A. L. Smith, L.J.:—

"It cannot be denied that the law upon notices to quit is highly technical; but the technicalities are too deeply rooted in our law to be now got rid of, and if any case had been found showing that a full six months' notice to quit given, as in the present case, for the anniversary of the day of the commencement of the tenancy was bad, I must have given effect to it; but, as no such case has been found, I do not desire to add one more technicality to a notice to quit unless compelled to do so.

I would point out that the plaintiff has only himself to blame for the difficulties he is in in this case. Had he added the words which are very ordinarily inserted in a notice to quit, 'or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice,' and which are inserted to avoid such a point as that now taken, all would have been in order; but the words are not there. If the notice to quit in this case had been for May 20 or 21 or any later day I should have had no doubt but that it was a bad notice; and I own that the inclination of my opinion is that the present notice is bad because it does not expire upon the last day of some year of the tenancy; but, as Lord Halsbury and Lindley, L.J., are of opinion that, inasmuch as this was a full six months' notice given to quit upon the anniversary of the day upon which the tenancy commenced, it is good, though the tenancy expired at midnight the day before, I yield to what they say, and will not differ from them, and hold that this unmeritorious technicality must prevail; and I content myself with expressing what I have said. This appeal must be allowed."

Another instructive case on this point is *Harvey* v. *Copeland*[3]. A weekly tenancy commencing on Thursday was held to have been duly determined by notice served on Thursday, the 5th November, to quit on or before Friday, the 13th November. A strict view of the law was taken by Gibson, J. The tenant ought to have been called on to quit on Thursday, but, as he was entitled under the notice to remain until midnight on Friday, that notice was bad. But the majority of the Court did not concur in this view. Referring to *Doe d. Spicer* v. *Lea*[4] O'Brien, J., thus remarks:

3. (1892) 30 L.R. (Ireland) 412   4 (1809) 11 East 312.

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"But if ever there was a case in which, on account of the nature of it and the sense, the rule ought to be confined to the particular facts, it is *Doe d Spicer* v. *Lea*[4]. In that case, however, the designation was of a gale day. Here it is of a time when alone the right of the landlord could be enforced. He could not turn the tenant out of bed at 12 o'clock at night. Then, is he not entitled to say, this is a notice to you to quit one minute after 12 o'clock on Thursday? If the notice had been to quit at the end of the week, I apprehend that would be good."

Then in *Harihar Banerjee* v. *Ramsashi Roy*[5] it has been held by the Privy Council that a notice to quit should be construed *ut res magis valeat, quam pereat*. Among the observations approved in that case is the following of Patteson, J.:

"It is not required that a notice should be worded with the accuracy of a plea. It is not drawn with strict precision but I think it is sufficiently clear."

We must give the notice a rational interpretation. Following these decisions I am satisfied that the notice to quit in this case is a good notice.

I have so far dealt with the question on the footing that the document is admissible in evidence. But, supposing I am wrong in that view, does a different result follow? Under section 116 of the Transfer of Property Act dealing with holding over tenancies, the lease, after the expiry of the original term, must be taken to have been renewed from month to month. Such a lease is terminable, under section 106, by 15 days' notice expiring with the end of a month of the tenancy. The question is, what is the month of the tenancy in the present case? It is admitted that the rent receipts which the plaintiff passed and the defendant accepted were uniformly for English calendar months, such as January, February. If that is the month of the tenancy, the notice to quit, on the reasoning I have adopted, is good. The result is, whether agreement is received in evidence or not, the notice is a valid notice and the tenancy has been properly terminated.

The only question that remains is as regards costs. Is this a case where I should not allow the plaintiff costs under the *section* 16 of the City Civil Courts Act? An important question has been raised and very fully argued. As a matter of fact, knowing that this defence was going to be raised, the plaintiff filed the suit in this Court; in the circumstances I am not prepared to deprive him of his costs.

The mesne profits up to date amount to Rs. 274-2-0 and future mesne profits are allowed at the rate of Rs. 175 per month.

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4 (1809) 11 East 312.

5. (1918) L.R. 45 I.A. 222: I.L.R. 46 C 458. 35 M.L.J. 707 (P.C).

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I pass a decree in favour of the plaintiff for possession with Rs. 274-2-0 for mesne profits up to date and future mesne profits at Rs. 175 per month and costs of suit. Time for delivery of possession till 5th December, 1930.

K.C. *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

K. V. Subramania Aiyâr .. *Petitioner* in both (Accused in both).*

In re Subramania Aiyar.

District Municipalities Act (V of 1920), S. 300 and Government Rules framed under that section, Rr. 2 (1), 11 (1) (a) ar 11 (2)—Person convicted in two cases (i) for not producing his child for vaccination after due notice, and (ii) for continuing in his breach after due notice on the same date—Whether punishable for two offences on same facts—How far his continued neglect was an offence.

A person, resident of a District Municipality, was convicted by the 1st Class Bench of Magistrates for failure to produce his 3½ years old child for vaccination as required by a notice served on him on a certain day, an offence falling under S 300 of the District Municipalities Act read with Rr. 2 (1) and 11 (1) (a) of the rules framed by the Government under that section, and was sentenced to fine and, in default, to suffer imprisonment In the next case against the same person, he was convicted for failure to comply with another notice served on him on the same date calling on him to discontinue his previous breach of vaccination rules, an offence falling under S. 300 read with R. 11 (2) of the rules framed by the Government under the section and was sentenced to fine and to imprisonment, in default of paying it.

Held, (1) that the conviction was unsustainable for the reasons, that the petitioner cannot be punished for two offences on the same facts, as the notices served on the petitioner were in fact nothing more than a repetition of the same demand, though served in two forms, and further the offence constituted by the petitioner's persistence in his neglect to take the child to be vaccinated under R. 11 (1) (a) is not merely neglect as such for which the offender has already suffered punishment, but a continuing breach which is separately punishable under R 11 (2) with a penalty calculated according to the period during which the offender persists in his neglect, and

(2) that in view of the clear language of R. 11 (2) the neglect on the part of the petitioner to produce his child for 32 days was an offence.

Pilcher v. *Stafford,* (1864) 122 E.R. 651, referred to and distinguished.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 1st Class Bench of Magistrates, Palghat in Summary Trials Nos. 1481 and 1485 of 1929, respectively.

S. V. Venkatasubramaniam for petitioner.

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*Cr R. Cases Nos. 24 and 25 of 1930. 20th August 1930.
Cr R. Petitions Nos 23 and 24 of 1930.

In re Subramania Aiyar.

K. Venkataraghavachari for *The Acting Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner, a resident of Palghat Municipality, was convicted and fined by the 1st Class Bench of Magistrates in both the above cases. In Case No. 24 he was convicted for failure to produce his 3½-year old child for vaccination as required by a notice served on him on 23rd September, 1929, an offence falling under section 300 of the District Municipalities Act read with Rr. 2 (1) and 11 (1) (*a*) of the rules framed by Government under that section and he was sentenced to pay a fine of Rs. 3 or to suffer 3 days' simple imprisonment in default. In Case No. 25 he was convicted for failure to comply with another notice served on him on the same day, 23rd September, 1929, calling on him to discontinue his previous breach of the vaccination rules, *viz.*, failure to get the same child vaccinated in pursuance of a previous notice, an offence falling under section 300 of the District Municipalities Act read with R. 11 (2) of the rules framed by Government under the section and he was sentenced to pay a fine of Rs. 8 at As. 4 per day for 32 days, or to suffer 3 days' simple imprisonment in default.

The petitioner says he has *bona fide* and conscientious objections to getting his child vaccinated as it will be injurious to its health and that so far as his conviction in Case No. 24 is concerned, the Magistrates have erred in declining to consider it at all as according to him it is a reasonable excuse within the meaning of R. 11 (1) (*a*) of the rules. This raises an interesting question which is now dealt with by section 2 of 61 and 62 Vic., c. 49, exempting conscientious objectors from the operation of compulsory vaccination statutes. But there is no corresponding exemption in the District Municipalities Act. The decision in *Rutter* v. *Norton*[1] shows that even under the previous Act 30 and 31 Vic., c. 84, section 29, objection to vaccinating a child on the ground that it was or was *bona fide* believed to be injurious to its health may be reasonable excuse under that Act. It is not, however, necessary to decide the point in this case, because the conviction in Criminal Revision Case No. 24 must fail for another reason. It is now admitted that the petitioner had already in S.C. No. 281 of 1929 before the Magistrate been convicted and sentenced for disobeying a previous notice to produce the same child for vaccination and that

1 57 J.P. 8.

In re Subramania Aiyar.

this Court refused to interfere with that conviction (Cr. R.C. No. 836 of 1929). The present notices served on him on 23rd September, 1929, were in fact nothing more than a repetition of the same demand though served in two forms, one as a notice to produce the child for vaccination, the other as one to discontinue his breach of the previous notice. It is clear to me that the petitioner cannot be punished, as he has been, for two offences on the same facts (*cf.* section 26, General Clauses Act). Apart from that, there is the further objection in respect of the conviction in Case No. 24, that according to the rules, once a person has been convicted for neglecting to take his child to be vaccinated under R. 11 (1) (*a*) his persistence in such neglect is punishable not as "neglect" under that rule but as "continuing breach" under R. 11 (2). (*Pilcher* v. *Stafford*[2].) The offence constituted by such persistence is really not merely neglect as such for which the offender has already suffered punishment but a continuing breach which is separately punishable under R. 11 (2) with a penalty calculated according to the period during which the offender persists in his neglect. For both reasons the conviction in Case No. 24 is unsustainable and is set aside. The fine of Rs. 3, if paid, will be refunded.

In Cr. R. C. No. 25, in which the petitioner has been found to have neglected to produce his child for 32 days his advocate's argument, lucid and to the point, was that continuing to neglect to produce a child for vaccination is no offence at all. For this *Pilcher* v. *Stafford*[2], a decision passed under 16 and 17 Vic., c. 100 and 24 and 25 Vic., c. 59 was cited. It was there decided that where a parent or a person having the care, nurture, or custody of a child has incurred and paid the penalty for neglecting to have it vaccinated within the time specified by Statutes, a continuous neglect to have it vaccinated is not a further breach of the Statutes. But the judgment of Cockburn, C.J., shows that that was because nothing corresponding to R. 11 (2) penalising continuous neglect existed in the then Statutes and as he said "nothing will meet it (the mischief) but fresh legislation". In view of the clear language of R. 11 (2) the above decision is not applicable. The petition in Cr. R. C. No. 25 is dismissed.

K.C. *Conviction in Case No. 24 set aside.*

Cr. R. C. No. 25 dismissed.

2. (1864) 122 E.R. 651.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, C.J. AND MR. JUSTICE CURGENVEN.

Ramanathan Chetti and others .. *Appellants** (*Plffs.*)

v.

Delhi Batcha Tevar *alias* Udayana Tevar and others .. *Respondents* (*Defts.*).

Ramanathan Chetti *v.* Delhi Batcha Tevar.

Mortgage—Attestation—Registration endorsement—Admission of execution before Sub-Registrar—Absence of evidence showing that the witnesses signed in the presence of the admitting executants—No endorsement to that effect either—If sufficient attestation—Registration—Inclusion of property to which mortgagor had no title—Mortgagee not aware of the want of title—Onus of proving collusion.

The mere endorsement by the Sub-Registrar of admission of execution and the signature of the witnesses present at that time are not sufficient to satisfy the requirements of S 59 of the Transfer of Property Act as amended by Acts XXVII of 1926, X of 1927 and XII of 1927, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants, nor any endorsement to that effect.

Veerappa Chettiar v. *Subramania Aiyar*, (1928) I.L.R. 52 Mad. 123: 55 M.L.J. 794 (F.B.), discussed.

The fact that an item of property not belonging to the mortgagor has been included in the mortgage will not render the registration invalid unless such inclusion was made with a view to commit a fraud on the registration laws and the mortgagees were parties to that fraud If the properties were non-existent, its inclusion would invalidate the mortgage, but where it is existent, there should be strong evidence of the mortgagees' collusion, and the onus of proving such collusion will be on those who attack the validity of the registration.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, dated the 17th day of January, 1924, and made in Original Suit No. 85 of 1919.

The Advocate-General, V. Rajagopala Aiyar and *T. V. Ramiah* for appellant.

S. Varadachariar, T. M. Ramaswami Aiyar, M. Subba roya Aiyar and *K. Seshagiri Rao Naidu* for respondents.

The Court delivered the following

JUDGMENT.—The suit is to recover from defendants 1 to 3 the sum of Rs. 49,982-3-2 due on a mortgage executed by the 1st defendant for himself and as guardian of his son since deceased, the 2nd defendant and Vengu Nachiar, who is also dead. The other respondents are subsequent mortgagees. The mortgage is dated the 20th January, 1902, and was for a consideration of Rs. 7,500 payable within six years with compound

*Appeal No. 403 of 1924. 11th February, 1930

interest at 1 per cent. per mensem with ten months' rests and in default on demand with compound interest at the same rate with ten months' rests. It is alleged that the debt was contracted for the expenses of a suit, O.S. No. 18 of 1901, on the file of the Sub-Court, East Madura, for household expenses and for discharging prior sundry debts. There are two items of property recited in the mortgage deed and the first item is alleged to belong to the 2nd defendant but under the decree in the before-mentioned suit the 2nd defendant and the late Vengu Nachiar are each entitled to a quarter share. The plaintiffs who are the appellants in this appeal are content with a decree being passed against the half share in that item, that is to say, the 2nd defendant's quarter share and Vengu Nachiar's quarter share.

In the Lower Court the 1st defendant admitted execution of the mortgage bond but denied that he had any interest in the mortgaged property and alleged that the suit as against him was barred by limitation. The 2nd defendant is a gosha lady. The defences raised were that the mortgage deed was not properly executed, that two of the executants, the 2nd defendant and Vengu Nachiar, being gosha ladies, had no knowledge of the contents of the deed, that it was not properly attested and that it was not validly registered. The defence also disputed the plaintiffs' claims to be entitled to a half share in item No. 1, it being alleged that if the bond was good, all that the plaintiffs would be entitled to was a quarter share. It was also alleged that there was no consideration for the deed.

The chief points for consideration in this appeal are whether the document was properly attested and whether it was validly registered. The document is Ex. B and there were five witnesses to the document, namely, Venkatachalam Chetty, who is now dead, Subbayyan, P.W. 4, Ramaswami Aiyar now dead. Rama Rao, the writer of the document P.W. 3 and Kaleeswara Aiyar, who was not called as a witness. The learned Subordinate Judge does not believe the evidence of P.Ws. 3 and 4 and rejects it as being entirely unreliable. The gosha ladies are said by these witnesses to have been behind the purdah, but P.W. 3 says that he was near the curtain and saw the ladies sign the document as there was a small space of 2 or 3 inches between the lower extremity of the curtain and the floor. He was sitting about 6 or 7 feet from the entrance step and obviously without bending his head could not have seen anything that went on behind the curtain. However, that difficulty is

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got over by the witness as he states that he bent his head a little in order to see what was being done behind the curtain and was able to see the ladies sign. P.W. 4's evidence is to the same effect as that of P.W. 3. The learned Subordinate Judge thinks that this evidence, besides being difficult to believe, was introduced in order to fulfil the requirements laid down by the Privy Council in *Shamu Pattar* v. *Abdul Khadir Ravuthan*[1]. There it was held, affirming the decision of the Madras High Court, that attestation of a mortgage deed within the meaning of section 55 of the Transfer of Property Act (IV of 1882) must be made by the witnesses signing their names after seeing the actual execution of the deed and that mere acknowledgment of his signature by the executant is not sufficient. The suit mortgage deed was executed in the year 1902, ten years before the decision of the Privy Council in the before-mentioned case. Up to that time attestation according to that strict interpretation by the Privy Council was not ordinarily had. I agree with the learned Subordinate Judge that the evidence of these two witnesses is unreliable on this point and should be rejected. Therefore the two ladies being gosha ladies the evidence of their having signed the document should be clear beyond reasonable doubt. The Advocate-General, however, contends that it is probable that the ladies did properly execute the document as they could read and write and were therefore fully capable of understanding what the document was about and they have never until the present suit repudiated this mortgage. He refers also to Ex. D. That is a document executed in favour of one Annamalai Chettiar. There were six executants to that document including Delhi Batcha, the husband of both Vengu Nachiar and Boothaka Nachiar, Vengu Nachiar herself and Boothaka Nachiar herself. This document is dated the 14th March, 1903, and in it the suit mortgage is set out. In 1914 Vengu Nachiar wrote a letter Ex. F through a vakil to the 1st plaintiff's brother relating to an appeal to the Privy Council and for the purpose of getting all the mortgagees including the 1st plaintiff's brother to finance that appeal. This letter was written about four years before the present suit was filed, and this, the Advocate-General argues, shows that the suit mortgage was recognised by Vengu Nachiar. Then there is Ex. H, the judgment in a suit filed by the Court of Wards after the death of the Raja claiming the property on behalf of the present Raja. In that suit the plaintiffs were made party defendants

1 (1912) L.R. 39 I.A. 218: I.L.R. 35 M 607· 23 M.L.J 321 (P.C.).

as mortgagees and Boothaka Nachiar and Vengu Nachiar were also defendants and it is argued that as Vengu Nachiar and Boothaka Nachiar did not raise any contention in that suit that the appellants here were not mortgagees, they must be taken to have accepted the position. All the arguments of the Advocate-General based upon the conduct of these gosha ladies subsequent to the suit mortgage lose much of their force by reason of the fact that the ladies are gosha and there is no satisfactory evidence that they knew anything more about the documents in the proceedings referred to than they did about the suit mortgage. It is, however, contended that by reason of section 2 of the Transfer of Property (Amendment) Act, 1926, the requirements as regards due attestation of a document required to be registered are satisfied in this case because the endorsements made by the Sub-Registrar, Sivaganga, show that the execution of the mortgage deed was admitted by the 1st defendant Vengu Nachiar and Boothaka Nachiar and that those admissions were witnessed by the two witnesses whose names are set out at the foot of the document. Section 2 of the Transfer of Property (Amendment) Act, 1926, states that:

"'attested,' in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

From this it is argued that all the requirements of this section have been fulfilled and that not only did Vengu Nachiar and Boothaka Nachiar admit the execution of the mortgage deed but that they did so in the presence of two witnesses. It is further contended that it is not necessary to examine the Sub-Registrar as his endorsement is presumed to be correct and that the burden of proving that his endorsement is incorrect is cast upon the other side. In this connection *Radha Mohan Dutta* v. *Nripendra Nath Nandy*[2] was referred to. In that case it was held that judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. In that case there were two witnesses to the mortgage deed whose names appeared as attesting witnesses. In the Registration Office the mortgagor acknowledged execution of the deed before the Sub-Registrar and the endorsement of the Sub-Registrar was to the effect

2. (1927) 47 C.L.J. 118

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that execution was admitted by the mortgagor. It was held that the acknowledgment before the Sub-Registrar and the signature below the endorsement on the deed amounted to sufficient attestation within the meaning of section 3 of the Transfer of Property Act as amended by the Amendment Act XXVII of 1926. From a reading of the facts of the case it appears that the admission of the execution of the document was made to the Sub-Registrar only and he therefore was the only witness to that admission. The Calcutta High Court therefore considered that the endorsement by the Sub-Registrar that the admission had been made in his presence was sufficient compliance with the provisions of the Transfer of Property (Amendment) Act and must be taken as being correct. But according to section 2 of the Transfer of Property (Amendment) Act there must be two witnesses to the admission by the executant although they need not both be present at the same time. It is contended by the Advocate-General that his argument is supported by a decision of a Full Bench of this Court in *Veerappa Chettiar* v. *Subramania Aiyar*[3]. It was there held that Acts XXVII of 1926, X of 1927 and XII of 1927 relating to the attestation of certain documents, are retrospective in their nature, so as to apply to documents executed on a date prior to their coming into force and further that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement under sections 58 and 59 of the Registration Act (XVI of 1908) are a sufficient attestation within the meaning of section 59 of the Transfer of Property Act and its amending Acts. This case originally came before a Bench consisting of the late Chief Justice Sir Murray Coutts Trotter and Mr. Justice Srinivasa Aiyangar and they passed an order calling for findings on the three following matters:—(1) Whether the Sub-Registrar who registered the instrument Ex. A in the case, made his signature in the registration endorsement referring to the admission of execution by the executants of the document, in the presence of the executants? (2) Whether the witnesses who identified the executants before the Sub-Registrar were present when such admission of execution was made by the executant? and (3) Whether they or either of them made their signature in the presence of the executants? In compliance with this order the Subordinate Judge sent up the following findings: On the first issue he found that the Sub-Registrar who registered Ex. A made his

3 (1928) I.L.R. 52 M 123· 55 M.L.J. 794 (F B).

signature in the registration endorsement referring to the admission of the execution by the executants of the document in the presence of the executants; on the second issue, he found that the witnesses who identified the executants of Ex. A before the Sub-Registrar were present when the admission of execution of that document was made by the executants; and on the third issue, he found that both the identifying witnesses made their signatures in the presence of the executants of Ex. A. On these findings a reference was made to a Full Bench which answered the questions referred to it in the manner already stated. In my view, this case does not assist the appellants because according to the findings of the Subordinate Judge in that case, the provisions of section 2 of the Transfer of Property (Amendment) Act were strictly complied with. The difficulty with which the appellants are faced here is that there is no evidence on the face of the document to show that the signatures of both or either of the witnesses to the admission of execution by Vengu Nachiar and Boothaka Nachiar were affixed to the document in the presence of the admitting executants. That is what is required by the law and what was in fact actually done in the Full Bench case. All that appears from the endorsement of the Sub-Registrar is that two witnesses were examined and both of them being ladies, of course, were able to go behind the purdah. The particulars endorsed on the mortgage bond are those required by sections 58 and 59 of the Indian Registration Act. Section 58 requires that there shall be endorsed the following particulars, namely, the signature and addition of every person admitting the execution of the document, the signature and addition of every person examined in reference to such document under the provisions of the Act and any payment of money or delivery of goods made in the presence of the registering officer or any admission of receipt of consideration made in his presence; and section 59 requires that the registering officer shall affix the date and his signature to all endorsements made under sections 52 to 58 relating to the same document and made in his presence on the same day. But as I have already stated, there is no evidence to show that there was sufficient attestation within the meaning of section 59 of the Transfer of Property Act and its amending Acts. There is no endorsement to the effect that the two witnesses signed the document in the presence of the two admitting executants. Nevertheless we are asked to infer that they must have done so. If the Sub-Registrar could have been called as a witness in the Court below he might have been able to

clear up the matter. It is pointed out that it was impossible or at the least very difficult to call him having regard to the fact that his whereabouts are not known after this lapse of time. That of course is quite true but it does not seem to me to be a reason for drawing any inference in his absence of proper attestation of the document, and I must, therefore, hold that it has not been properly attested.

In view of the above findings, it is not necessary to deal with any of the other defences raised in the suit but nevertheless I propose to deal with them though very briefly. With regard to the defence that the suit mortgage deed was not validly registered, it is based upon the inclusion in the suit mortgage of item No. 2. [His Lordship then dealt with the evidence and concluded that]

The 1st defendant had no title to item No. 2. This, however, does not dispose of the respondent's contention that its inclusion in the suit mortgage deed renders the mortgage invalid. This seems to me to depend upon whether it was included in the deed for the purpose of committing a fraud upon the registration laws and the mortgagees were parties to that fraud. If the property had been non-existent, then it is clear that its inclusion would invalidate the mortgage. But to argue that because the 1st defendant had no title to it, the mortgage is invalid is a totally different matter. The learned Subordinate Judge thinks that item No. 2 was inserted in order to enable the document to be registered in Sivaganga itself which is probable, and he says that there is no evidence in the case that the plaintiffs' father who took the suit mortgage ascertained after enquiry whether the 1st defendant's father had any right to the property. I do not think that that is the correct test to apply. In my view, there should be the strongest possible evidence of the fact that there was collusion between the mortgagors and the mortgagees before the mortgagees can be deprived of the mortgage amount owing under the mortgage by reason of its registration being invalid because of the inclusion of a small item of property not belonging to the mortgagors. The penalty is a very heavy one and I can see no evidence at all here that the appellants' father had any reason to suppose that the 1st defendant had no title to the property. The appellants in fact did not carry through the transaction and it is not enough to say that he omitted to ascertain whether 1st defendant had a good title. It is not a question of negligence but of fraud and the burden of proving this lies upon the res-

Ramanathan Chetti v. Delhi Batcha Tevar.

pondents. The 1st defendant who could have given evidence as to this was not examined as a witness in the case. I must hold, therefore, that the registration of the suit mortgage deed was not invalid on that account. With regard to the plea that there was no consideration on the mortgage, although it is not one that need be decided now in view of the findings that the mortgage-deed was not properly attested, I cannot see any grounds for upholding the respondents' contention that no consideration passed. In the circumstances it is not necessary to go into the question as to whether the appellants would be entitled to a half share of the property or only a quarter. For the reasons already stated, this appeal must be dismissed with costs throughout.

S.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

C. Jagannadham Pillai .. *Appellant* (Plaintiff)*

v.

The Official Assignee, Madras and others .. *Respondents (Defendants).*

Jagannadham Pillai v. The Official Assignee, Madras.

Indian Registration Act (XVI of 1908), S. 17—Mortgage by depositing title-deeds—Memorandum of agreement—Letter sent along with the deposit referring to the agreement—Whether letter and agreement should be read together in order to constitute a document requiring registration—Suit on the mortgage—Mortgage found invalid—Whether Court can give a personal decree

Where a promissory note was executed by a person on the 25th of May, 1923, for a certain amount, and he executed on the following day (26th) an agreement to deposit title-deeds and on the 27th he sent the title-deeds with a letter whose wording was as follows:—"I have the honour of herewith sending you with the intention of delivering and depositing the same with you as per the memorandum, dated the 26th of May, 1923, executed by me in your favour the title-deeds and papers relating to the property . . . . " and referred to the schedules annexed to the letter, the question to be decided, in order to discover whether or not the mortgage was valid, was whether the letter required registration as embodying a bargain between the parties.

Held that, since the letter made reference to the memorandum of agreement of the previous day, the two documents must be read together, and, when so read, they constituted a document within the terms of S. 17

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*O.S. Appeals Nos. 71, 98 and 108 of 1926. 22nd July, 1930

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of the Indian Registration Act, and therefore the mortgage was invalid for want of registration

Shaw v. *Foster,* (1872) L.R. 5 H.L. 321, followed.

Where apart from a general prayer "for such further and other reliefs as to this Honourable Court may seem meet or the nature of the case may require" the plaint asks that the defendant be directed to pay to the plaintiffs the sum named and goes on, in the ordinary terms of a mortgage suit, to ask for the sale of the properties and, if the proceeds are not sufficient, for a personal decree, it is within the competence of the Court, upon failure of the mortgage, to give such a decree on a plaint so framed, provided of course it be not barred.

Pulaka Veetil Muthalakidangara Kunhu Moidu v. *Thiruthipalli Madhava Menon,* (1909) I.L.R. 32 Mad. 410· 19 M.L.J. 584 (F.B.), followed

Gajadhar Mahton v. *Ambika Prasad Tiwari,* (1925) I.L.R. 47 All. 459: 49 M.L.J. 238 (P.C.), referred to and explained

On appeal from the judgment of the Honourable Mr. Justice Beasley, dated 23rd July, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 358 of 1924.

T. P. Meenakshisundaram for appellant.

The Advocate-General and *V. Rajagopala Aiyar* for 1st respondent.

The Court delivered the following

Curgenven J.

JUDGMENTS. *Curgenven, J.*—These three appeals, arising out of two suits tried by Beasley, J., as he then was, may be disposed of together since they relate to the same set of transactions. Jagannadham Pillai and one Somasundaram Chetti (now dead) carried on a hardware and machinery business in partnership from 1913 to 1923. One of the two suits (C.S. No. 358 of 1924) was brought by Jagannadham Pillai for dissolution of this partnership and for accounts. At the trial it was agreed that the partnership was no longer subsisting so that it became a suit for accounts only. The case for the defendants, who were the sons of Somasundaram Chetti, was that the accounts had already been settled between the partners and indeed on two occasions. In 1920 there was a settlement with effect to the end of December, 1918, with the result that Jagannadham Pillai received Rs. 13,800 as his share of the profits. Again in 1923 there was a second settlement up to the termination of the partnership, and, probably because post-war conditions were not favourable to a business of this kind, a considerable loss had to be divided and Jagannadham Pillai made himself liable, by means to which I will subsequently refer, for the share to which his partnership related. He now repudiates both these so-called settlements of account on the ground that he was in fact no party to them and that they are in fraud of

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his interests. If it is to be held that they did amount to settlements, his further plea is that owing to certain errors they are not binding upon him.

These pleas are raised in the face of a number of written admissions accepting his liability. The partnership agreement was originally an oral one. But on the 11th of June, 1920, when Jagannadham Pillai's share was reduced from 1|4 to 1|5, the agreement Ex. A was executed. This contains a statement subscribed to by Jagannadham Pillai that accounts had been taken up to the 31st of December 1918 and that he had received the amount due to him. Again when to provide for his ultimate liability he executed the promissory note Ex. E on the 25th of May, 1923, he made a similar admission with regard to the profit due up to the end of 1918. Then as regards the second settlement, Ex. E itself is the most important piece of evidence of its acceptance by Jagannadham Pillai, and this document was followed by what purported to be a mortgage by deposit of title-deeds; and the agreement to enter into this mortgage comprises another admission, and further such admissions are to be found in the stock books of the partnership. In all, as the plaintiff had to admit, he acknowledged a debt of Rs. 62,000 to the defendants in five different documents. Yet he has had the effrontery to state in evidence that he had no opportunities of looking into the accounts and that he signed these documents blindly trusting the honesty of Somasundaram Chetti. He can hardly pretend that he is a man without any business abilities or experience because for 20 years he was in charge of the hardware department of Messrs. Oakes & Co. drawing a salary of Rs. 100 a month and 10 per cent. commission on sales. His evidence contains a number of prevarications regarding his acquaintance with the accounts, but the admission that he makes as regards his signing some of the rough accounts proves, what is indeed only in accordance with probabilities, that as manager he was responsible for maintaining them. How far he is prepared to go will be seen from his assertion that he understood the promissory note Ex. E to be something in the way of a security bond for losses which might subsequently be incurred in the business. There is no doubt in my mind that on each occasion the plaintiff was perfectly well aware of what he was signing and that he must have given his agreement after a verification of the accounts. An attempt has been made to cast doubt upon the truth of the second settlement by reason of some discrepancy in regard to dates. In the written

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statement 31st July, 1920, is given as the date when accounts up to the 31st of December, 1918, were made up, while the date of Ex. A, as we have seen, is the 11th of June, 1920. However such a difference may be accounted for, no reason has been given for the view that it indicates the evidence regarding the settlements to be false.

Accepting then the fact of these two settlements, it remains to consider whether the plaintiff is entitled to have them reopened. It is unnecessary to discuss the principles upon which such reopening should be allowed, because he has failed not only to establish any kind of fraud but any kind of error. Before us he has raised five objections to the correctness of the accounts and I will briefly deal with these *seriatim*.

[After discussing the objections as to the correctness of the accounts His Lordship concludes]

The suit for an account was properly dismissed and O.S.A. No. 71 of 1926 must be dismissed with costs.

The remaining two appeals, O.S.A. Nos. 98 and 108 of 1926, arise out of C.S. No. 592 of 1924, which was a suit brought by Somasundaram Chetti's legal representatives against Jagannadham Pillai upon a mortgage by deposit of title-deeds. Reference has already been made to the promissory note, Ex. E, which Jagannadham Pillai executed on the 25th of May, 1923, for a sum of Rs. 62,017-13-8 due by him to the firm. This was followed on the following day (26th May) by an agreement to deposit title-deeds, Ex. IV, and on the 27th the title-deeds were sent with a letter which begins as follows:—

"I have the honour of herewith sending you with the intention of delivering and depositing the same with you as per the memorandum, dated the 26th May, 1923, executed by me in your favour the title-deeds and papers relating to the property . . . ."

and then follows a reference to the schedules annexed to the letter. The question the learned Judge had to decide in order to discover whether or not the mortgage was valid, was whether this letter required registration as embodying a bargain between the parties. The view which he has taken is that, since this letter makes reference to the memorandum of agreement of the previous day, the two documents must be read together, and so read they clearly embody the terms of the transaction. The Privy Council has laid down the law upon this subject in *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee*[1] and *Subramanian* v. *Lutchman*[2] It had been previously stated

1. (1916) L.R. 43 I.A. 122: I.L.R. 43 C. 895: 31 M.L.J. 155 (P.C).
2. (1922) L.R. 50 I.A. 77 I.L.R. 50 C. 338: 44 M.L.J. 602 (P.C).

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by Lord Cairns in the leading case of *Shaw* v. *Foster*[3] as follows:

"Although it is a well-established rule of equity that a deposit of a document of title without more, without writing or without a word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed."

In the present case there is no doubt that the act of depositing was accompanied by the letter under reference, a circumstance which distinguishes this case from some others as, for instance, *Krishnaiya* v. *Ponnuswami Aiyar*[4]. Then does the letter amount to an actual written charge? It is clear that the answer to this question depends upon the degree of formality which marks the document. A mere note saying "herewith the title-deeds" would not constitute an instrument of charge. A detailed statement containing the terms of the agreement, the amount of the debt to be secured, rate of interest, terms of repayment, particulars of the security, on the other hand, clearly would amount to such a document. While the letter under reference does enumerate the properties intended to be mortgaged it says nothing about the other particulars in express terms; but it makes it clear that further information is to be obtained from the memorandum, dated the 26th of May; and turning to this memorandum, and reading it in its turn with the promissory note, we obtain all the particulars of the transaction. The question is whether the procedure adopted amounted to recording those terms in a document requiring registration under section 17 of the Registration Act. Only one case has been brought to our attention relating to a document which refers to terms not expressly recited in it, and that is an unreported case decided by Madhavan Nair and Jackson, JJ.—A.S. Nos. 64, 117 and 176 of 1924. But in that case it was found that the document referred to a bargain which had already been completed, and to particulars which had not previously been reduced to writing. In the present instance it is, I think, clear that if the letter, besides referring to the memorandum of agreement, had also embodied its terms, it would have been registrable as a record of the transaction; and the mere fact that some other paper, whether an agreement or

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3 (1872) L.R. 5 H.L. 321. 4. (1923) I.L.R. 47 M. 398: 46 M.L.J. 295.

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any other record is immaterial, had to be read in order to ascertain those terms does not seem to me to make any difference in principle. I think that the learned Judge is clearly right in holding that the two documents, for the purpose of deciding this point, must be read together as the letter intends them to be, and so read they do constitute a document within the terms of section 17. I would hold, therefore, that the mortgage is invalid for lack of registration.

This disposes of the plaintiff's appeal in this suit. The learned Judge, however, considered that it was open to him to give a decree upon the promissory note, and against this decree the defendant has appealed. The decree was preceded by an order allowing amendment of the plaint, so as to comprise a prayer for a personal decree upon the promissory note. This order has been attacked before us, principally on the ground that when it was made the claim under the promissory note was time-barred. But I do not think we need consider whether or not the amendment should have been allowed because on the plaint as it originally stood it seems clear that a decree of this character could be granted. Apart from a general prayer "for such further and other reliefs as to this Honourable Court may seem meet or the nature of the case may require," paragraph 14 of the plaint asks that the defendant be directed to pay to the plaintiffs the sum named and goes on, in the ordinary terms of a mortgage suit, to ask for the sale of the properties and, if the proceeds are not sufficient, for a personal decree. It was I think clearly within the competence of the Court, upon failure of the mortgage, to give such a decree on a plaint so framed.

It has been held by a Full Bench of this Court in *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madhavan Menon*[5] that a personal covenant to pay may be proved by a mortgage invalid for defect of attestation, and I think it is incontestable that a Trial Court, on finding a mortgage to be invalid for this or any other reason, may give a decree on the personal covenant which it contains, provided of course that it be not barred. The only case to the contrary cited before us is *Gajadhar Mahton* v. *Ambika Prasad Tiwari*[6], where their Lordships of the Privy Council decided, clearly in the special circumstances of that case, that they should not themselves give a decree of this nature. Nor do I think that where as here the

5. (1909) I.L.R. 32 M. 410: 19 M.L.J. 584 (F.B.).
6 (1925) I.L.R. 47 A 459: 49 M.L.J. 238 (P.C.).

debt is embodied in a promissory note which forms the basis of the invalid mortgage the Court is any more disqualified from giving a decree upon that note. In the result I would dismiss both these appeals with costs.

Bhashyam Aiyangar, J.—I agree.

K.C. *Appeals dismissed.*

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Bhashyam Aiyangar, J

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

C. Krishnaswami Naidu .. *Appellant** (*Defendant*)

v.

K. Jayalakshmi Ammal .. *Respondent* (*Plaintiff*).

Krishnaswami Naidu v. Jayalakshmi Ammal

Practice—Pleading and proof—Variance between—Suit on agency—Decree on foot of partnership—Propriety—Action between partners—Suit for accounts alone, if maintainable.

The plaintiff brought a suit for accounts against the defendant as her agent in respect of a particular business but the Trial Court found they were partners and gave the plaintiff a decree for accounts on that basis.

Held, the finding was inconsistent with the case both of the plaintiff and the defendant Though in view of Issue No. 4 raising the question of the terms of the agreement between the plaintiff and the defendant, there was no surprise to the defendant, still the suit based, as it was, on a specific legal relation of agency cannot be converted into one based on an entirely different relation—that of partnership

Ananda Chandra Chuckerbutty v. *Braja Lal Singh*, (1922) I.L.R. 50 Cal. 292; *Ma Shwe Mya* v. *Maung Mo Hnaung*, (1921) L R. 48 I.A. 214: I.L R. 48 Cal. 832 (P.C.); *Sayedani Mahmuda Khatun Chowdhurani* v *Md Elahadad Khan Pani*, (1912) 17 C.W.N. 427 (P.C.) and *Kali Das Chaudhuri* v. *Sm Drapaudi Sundari Dassi*, (1917) 22 C.W.N. 104, referred to.

The principle that no suit for accounts can be maintained by one partner against another without a prayer for dissolution of partnership has, no doubt, been considerably relaxed in England, but the plaintiff suing only for accounts has got to allege special grounds for seeking that relief alone and the defendant should have an opportunity of showing his case against.

Kassa Mal v *Gopi*, (1886) I.L.R. 9 All. 120; *Damodara* v. *Subraya*, (1917) 33 M.L.J. 509 and *Karri Venkata Reddi* v. *Kollu Narasayya*, (1908) I.L.R. 32 Mad. 76: 19 M.L.J. 10, referred to.

Appeal against the judgment and decree of the Honourable Mr. Justice Kumaraswami Sastri, dated 17th October. 1928 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 691 of 1926.

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*O.S. Appeal No. 135 of 1928. 8th September, 1930.

Krishnaswami Naidu v. Jayalakshmi Ammal.

T. V. Venkatarama Aiyar and *R. Thirumalai Thathachariar* for appellant.

K. S. Krishnaswami Aiyangar and *E. R. Krishnan* for respondent.

The Court delivered the following

JUDGMENT.—The suit which gives rise to this appeal was filed by the widow of one Chengayya Naidu, who died in April, 1918, against her maternal uncle for an account of certain businesses which she alleged he had conducted as her agent. We are only concerned here with a rice mandi business which the defendant carried on from the time of Chengayya Naidu's death up to date of suit. The plaintiff's case was that since her husband did not dispose of this business by will, as he did of some other assets, it was hers by right of inheritance and that the defendant, who held her power of attorney, was only her agent. The defendant contended, on the other hand, that the mandi which Chengayya Naidu had been conducting was closed a few days before his death and that the subsequent business was the defendant's own, to a share in which the plaintiff had no title. Nevertheless, in consideration of the facts that she had lost her husband, was his relative and was living with him, he had voluntarily given her a half share, which continued up to October, 1918, when the successive arrangements described in paragraph 12 of the written statement were made. He further alleged that accounts had been settled and the plaintiff had received the allowances under this arrangement up to the 1st February, 1926. The case was tried by Kumaraswami Sastri, J., who found that neither the plaintiff nor the defendant was speaking the truth and decided that each was jointly interested in the business and entitled to a half share. He accordingly gave a declaration to this effect and referred the suit to a Commissioner to take an account. This decision has been attacked before us on the ground that it is consistent neither with the plaintiff's nor the defendant's pleas, and that of course is true. It appears that there was no application to amend the plaint, nor indeed could there well have been one, because this was no example of an inadvertent misstatement of facts or legal position but, according to the learned Judge's finding, a deliberate falsification of the truth. A number of issues were framed, Nos. 1 and 4 relating particularly to the rice mandi business. No. 1 was framed in the terms of the pleadings to enquire whether the business belonged to the plaintiff and whether she entrusted it to the defendant for

management, or whether it had been given to the defendant. No. 4 ran thus:

"Was there an agreement to give the plaintiff a share of the profits in the said business as stated in paragraph 12 of the written statement and, if so, what are the terms thereof."

There has been some discussion as to what the learned Judge's finding amounts to, whether it means that the parties were in partnership. Mr. K. S. Krishnaswami Aiyangar for the respondent has done his best to resist that conclusion for reasons which are not very difficult to surmise. It is true that the judgment contains no express reference to a partnership but it is further true that if the incidents of such a legal relationship appear to have been found by the Court a partnership must be inferred. The learned Judge expresses the view in the first place that the business was not transferred to the defendant and that he was not merely looking after it on plaintiff's account. He then gives grounds for adopting an intermediate view, involving some arrangement for carrying on the business; and says that all probabilities point to the conclusion that each was to get a half share, adding his finding that they were "jointly interested". For the respondent it is sought to add to these findings an averment of the defendant that the plaintiff, who was to get *ex gratia* a half share, was not to be liable for any losses, but the judgment makes no reference to this and we have no reason to suppose that this condition was held proved. Under section 239 of the Contract Act, partnership is defined as "the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them". We cannot find sufficient reason to doubt that this was the nature of the relationship between the parties which the learned Judge found, and not some other form of contract not specifically recognised or provided for by law, as Mr. K. S. Krishnaswami Aiyangar would suggest.

Thus the question is whether a suit by a principal against an agent can be converted into a suit by one partner against another. There can be no doubt that the two suits are essentially different in character and this circumstance, together with the consideration that the defendant may have been taken by surprise, are the two main grounds upon which decisions on this question have been based. The principles are thus stated in *Ananda Chandra Chuckerbutty* v. *Braja Lal Singh*[1]:

1 (1922) I.L.R. 50 C. 292.

Krishnaswami Naidu v. Jayalakshmi Ammal.

"The rule that the pleading and proof must correspond is intended to serve a double purpose; first, to apprise the defendant distinctly and specifically of the case he is called upon to answer; and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations The test is, whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence; or, as has sometimes been said, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action."

In *Ma Shwe Mya* v. *Maung Mo Hnaung*[2] the Privy Council decided that a claim must be dismissed, because the cause of action upon which it was allowed was different from that recited in the plaint, and in *Sayedani Mahmuda Khatun Chowdhurani* v. *Muhamad Elahadad Khan Pani*[3] the same principle was applied by the Board where the plaintiff's claim was found to be "upon a basis wholly different from that upon which the suit was founded". There are a number of cases relating to the amendment of a plaint which applied the same principles. An example of such a case is *Kali Das Chaudhuri* v. *Sm. Drapaudi Sundari Dassi*[4] which gives effect to the principle that,

"Where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation."

Although, therefore, there is some substance in the plea that the defendant may not have been taken by surprise in view of the framing of issue No. 4, there is undoubtedly much authority for the appellant's contention that a decree on a partnership basis should not have been given in the circumstances and certainly not without a prior amendment of the plaint. The matter, however, does not rest there.

It has been said that the plaintiff has been given a decree for an account and it arises for consideration in what circumstances such a decree, unassociated with a decree for dissolution and during the currency of the partnership, can be given. No doubt in England the old rule, that the Courts of Equity will not interfere between partners except for the purpose of dissolving the partnership or, if it was dissolved already, of finally winding up its affairs, has been relaxed in modern times. But still the question arises when one partner sues another otherwise than for dissolution, can relief be had without dissolving the partnership? (Lindley, 9th Ed., pages 568-9.) A simi-

2 (1921) L.R. 48 I.A. 214· I.L.R. 48 C. 832 (P.C.).
3 (1912) 17 C.W.N. 427 (P.C.). 4 (1917) 22 C.W.N. 104.

Krishna-swami Naidu v. Jayalakshmi Ammal.

lar statement of the law is to be found in 22 Halsbury 71, section 138. The same principle has been applied to such suits in this country, as where in *Kassa Mal* v. *Gopi*,[5] Edge, C.J., observes:

> "It is only under exceptional circumstances that partners can bring such actions against their co-partners, except when the action is for a dissolution of partnership, in which case they may claim an account and payment over of moneys that may be found to be due to them on the account being taken. So far as I am aware, actions between partners, which involve the taking of partnership accounts prior to dissolution, are almost unheard of"

and he proceeds to discuss the English law on the subject. The same principle was applied in *Damodara Shanabhaga* v. *Subraya Pai*[6] and was recognised in *Karri Venkata Reddi* v. *Kollu Narasayya*[7], although the special circumstances of that case justified the Court in interfering. The respondent's learned advocate scarcely contests the correctness of this position, his contention being, as has been said, that the arrangement between the parties did not amount to partnership. He further undertakes on behalf of his client not to press any subsequent claims, but we are unable to regard this as entitled to affect our view of the legal position There seems no question but that if a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, and it follows that these grounds must be alleged by the plaintiff, while the defendant must have an opportunity of showing cause against. This condition necessarily remains unfulfilled in the present case, and we are unable to hold that the plaintiff is entitled to a decree for an account in the face of the circumstances that not only has she failed to justify special treatment but, on the finding of the learned Judge, has falsified her case to the extent of not alleging a partnership at all. In these circumstances we think there are very special reasons why a decree of the nature under reference should not have been granted upon the pleadings and with much respect we are unable to support the learned Judge's decision to this extent. We must accordingly allow the appeal and direct that the reference to the rice mandi business be expunged from the decree. This will involve the deletion of paragraphs 1 and 2, of the words "either in respect of the said mandi business or" in paragraph 4 and of paragraph 5 (*a*), the remaining paragraphs being re-numbered. Costs in the Lower Court have

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5 (1886) I.L.R. 9 A 120 6 (1917) 33 M.L.J. 509
7. (1908) I.L.R. 32 M. 76: 19 M.L.J. 10.

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been reserved for the final decree. The appellant will get his costs in this Court.

S.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of New South Wales.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND LORD RUSSELL OF KILLOWEN.

Robert Alan Hill and others .. *Appellants**

v.

The Permanent Trustee Company of New South Wales, Limited, and others .. *Respondents.*

P. C.

Robert Alan Hill v. The Permanent Trustee Company of New South Wales, Ltd.

Limited company—Payments to shareholders—Nature of—Income or corpus—*Test—Intention of the company if material.*

Moneys paid in respect of shares in a limited company may be income or *corpus* of a settled share according to the procedure adopted, *i.e*, according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up.

A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits.

Different considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend. In such a case, the company does not part with the moneys at all and the nature of the fund is indicated—not by the company's statements—but by its acts Unless and until such a procedure is adopted and the fund is in fact capitalised, no change in the character of the fund can be brought about by the company's expressed intention to distribute it as capital. As between the tenant for life and remainderman beneficially entitled under a trust fund comprising shares in a limited company, payments made by the company, of a surplus fund available for distribution by a fortunate appreciation in value of its capital assets and not required to satisfy either its shareholders or creditors, can only be treated as income and not *corpus* by whatever name it may be called by the company, 'dividend' or 'bonus' or any other.

Bouch v. *Sproule,* (1887) 12 A.C 385, explained.

Knowles v. *Ballarat Trustees,* 22 Comm. L.R. 212 and *Fisher* v. *Fisher,* 23 Comm. L.R. 337, overruled.

Bates, In re. *Mountain* v *Bates,* (1928) 1 Ch 682, approved

Judgment of the Supreme Court of New South Wales reversed.

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*P.C. Appeal No. 77 of 1929. 29th July, 1930.

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The facts of the case are fully stated in their Lordships' judgment.

Appeal No. 77 of 1929 from the decision of the Supreme Court of New South Wales.

W. A. Greene, K. C. and *W. Barton* for appellants.

J. M. Gover, K.C. and *A. C. Nesbitt* for respondents.

29th July, 1930. Their Lordships' judgment was delivered by

Lord Russell.

LORD RUSSELL OF KILLOWEN.—The Permanent Trustee Company of New South Wales, Limited (hereinafter referred to as the Trustee Company) is the trustee of the will of Richard Hill, deceased, and in that capacity holds as part of the investments, representing the trust estate, 40,800 shares in a company called the Buttabone Pastoral Co., Ltd. (hereinafter called the Buttabone Company). The Trustee Company is also the trustee of the trust fund comprised in a trust declared by indenture, dated the 9th January, 1914, and in that capacity holds 17,600 shares in the Buttabone Company.

In November, 1927, the Trustee Company received from the Buttabone Company a sum of £19,380 in respect of the 40,800 shares, and a sum of £8,360 in respect of the 17,600 shares, and the questions raised for decision on the present appeal are whether the sum of £19,380 is to be treated as *corpus* or income under the trusts of the said will, and whether the sum of £8,360 is to be treated as *corpus* or income under the trusts of the said indenture.

The relevant facts must first be stated. The testator (who died in August, 1895) was at his death the owner of a grazing property known as "Buttabone Station"; after his death additional lands were purchased which were paid for partly out of income of his estate and partly by moneys borrowed on the security of the lands purchased. For some years the testator's lands and the lands so purchased were worked together as one business. It is not a matter of surprise that complications and litigation ensued. The litigation was compromised in 1909, with the Court's sanction so as to bind infant beneficiaries. Under the compromise all the lands both original and additional were sold to the Buttabone Company, fully paid shares of £1 each in that company to the number of 85,000 being received by the then trustees of the said will as representing the capital of the estate employed in the said business. Other fully paid shares were issued to those individuals whose income had been used for capital purposes, in satisfaction of their claims and interest.

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Subsequently, viz., in 1914, the said declaration of trust was executed in exercise of powers contained in the said will for the purpose of settling upon certain trusts one of the shares of the testator's estate. Some of the said 85,000 shares were appropriated to those trusts.

Some of the settled shares held under the will have become distributable and have been distributed upon the deaths of tenants for life leaving issue, with the result that at the present time the Trustee Company holds the said 40,800 shares and the said 17,600 shares in the capacities beforementioned.

The Buttabone Company carried on business from the date of its incorporation, its business including wool-growing, the breeding and fattening of sheep and cattle, and the buying and selling of live stock.

In the year 1924 the Board of Directors determined that the time was opportune for disposing of the Buttabone Company's lands and stock to the best advantage of the shareholders, and between the 9th December, 1924 and the 22nd April, 1925, substantially the whole of the Buttabone Company's lands, live stock and other assets were sold, but as to some of the lands the terms of sale allowed six years for the payment of the total purchase-money.

Save in so far as the proceeds of sale have been distributed as hereafter appears, those proceeds have been invested and the income of the investments, and the interest paid by purchasers during the six years, have been distributed as dividend among the shareholders.

No resolution has ever been passed for the winding up of the Buttabone Company, but on the 12th April, 1926, a resolution for voluntary liquidation proposed by a shareholder at a general meeting was defeated.

The original Articles of Association of the Buttabone Company relating to dividends were in the following form:—

"*Article* 122—No dividend shall be payable except out of the profits arising from the business of the Company and no dividend shall carry interest.

"*Article* 124.—The directors may from time to time pay to the members (on account of the next forthcoming dividend) such interim dividends as in their judgment the position of the Company justifies. Subject as aforesaid the dividends shall be declared by the Company at its Ordinary General Meetings."

By special resolution passed at an Extraordinary General Meeting held on the 12th April, 1926, and confirmed at another Extraordinary General Meeting held on the 28th April, 1926, Arts. 122 and 124 were altered and now run thus:

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"*Article* 122.—No dividend shall be payable except out of the profits of the Company, and no dividend shall carry interest.

"*Article* 124—The directors may from time to time pay to the members such interim dividends as in their judgment the position of the Company justifies."

On the 28th April, 1926, the Board passed a resolution in the following terms:—

"Out of the sum of £103,342 14*s*. 3*d*, which arose wholly and exclusively from the sale of the land and improvements of the Company which were not acquired for the purpose of re-sale at a profit, there be paid to the shareholders an interim dividend at the rate of 11*s* 8¾*d* per share, and that such dividend be payable at the Company's office on and after noon on the 6th day of May, 1926."

A circular letter, dated the 3rd May, 1926, was sent to the shareholders, the terms of which ran thus:

"I have been instructed by the directors to advise that at a meeting held on the 28th ultimo the Board decided to pay to the shareholders out of moneys arising wholly and exclusively from the sale of the Company's land and improvements, a dividend at the rate of 11*s*. 8¾*d* per share, which is payable at the registered office of the Company at noon or after on Thursday the 6th instant.

"And I have further to advise that the directors decided to pay this dividend for the purpose of making a distribution of capital assets in advance of the winding up of the Company, as the Company has ceased to carry on its business

"The directors have consulted a leading equity counsel who advises that this dividend is not subject to either State or Federal income-tax"

No question arises for decision on this appeal in regard to this payment of 11*s*. 8¾*d*. per share.

On the 11th November, 1927, the Board passed a resolution in the following terms:—"That out of the profits of the Company a cash dividend of 9*s*. 6*d*. in respect of each fully paid share in the Company be declared and to be payable as soon as funds are available."

A circular letter, dated the 28th November, 1927, was sent to the shareholders, the terms of which run thus:

"I have been instructed by the directors to advise that at a meeting held on the 11th instant it was decided to pay out of the profits of the Company a cash dividend of 9*s*. 6*d* in respect of each fully paid share in the Company In accordance with this decision I enclose cheque for , being the amount to which you are entitled, and I will be obliged if you will sign and return to me in due course the attached form of acknowledgment.

"I have also been instructed to state that the dividend is being paid out of the profits arising from the sale of breeding stock, being assets of the company not required for purposes of resale at a profit, and that it is free of income-tax."

The Trustee Company having received the cash dividend of 9*s*. 6*d*. per share (amounting to £19,380 in respect of the

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settled shares and £8,360 in respect of the shares subject to the declaration of trust) issued an originating summons for the determination of the questions: (1) Whether upon the true construction of the said will and in the events which had happened the said sum of £19,380 should be treated as income or capital of the settled shares, and (2) whether upon the true construction of the said declaration of trust and in the events which had happened the said sum of £8,360 should be treated as income or *corpus* of the funds the subject of the said declaration of trust.

No distinction was drawn in the argument before their Lordships between these two sums, or between the phraseology of the trusts declared by the two instruments. The case was discussed by reference only to the wording of the will, and was argued upon the footing that according as the said sum of £19,380 was to be treated as *corpus* or income under the will so the said sum of £8,360 was to be treated as *corpus* or income under the declaration of trust. The two sums stand or fall together, and may be considered as if they were both subject to the trusts of the will. It is accordingly only necessary to refer, and that briefly, to the terms of the will. The first gift of income to the testator's sons and daughter is under the description of the balance or residue of "the net income to be derived from my said estate." This gift would appear to be confined to the period during which his daughter, Laura, resides in a certain cottage. There then follows a trust for sale and conversion of the whole estate and a trust of the proceeds in the following terms:—

"Upon trust to invest the same upon such security and generally in such manner as my trustees shall think fit with power to alter and vary any such investment or investments for another or others and to pay the net income or profits to be derived from such investment or investments in equal shares between my said ten sons and daughter during their respective lives, but so that each of them shall have the personal enjoyment thereof and not have the power to mortgage, encumber or deprive himself or herself thereof by way of anticipation the share of my said daughter to be for her sole and separate use and free from the debts, control or engagements of any husband and from and immediately after the death of each of my said sons and daughter upon trust as to one-eleventh part or share of the capital of my said trust estate for the child if only one or the children if more than one of the son or daughter so dying in equal shares and proportions as tenants-in-common and I declare that in the event of the death of any or either of my said sons or daughter without leaving lawful issue him or her surviving then and in such case the share of such son or daughter so dying shall be held upon trust in equal shares for the survivor or survivors of my said sons and daughter in the same manner as the original share devised to him, her or them by this my will."

The case was also argued upon the footing that the payment of 9*s.* 6*d.* per share was the payment of a dividend by the directors in due and proper exercise of the powers conferred upon them by Art. 124. Further, it is common ground, and rightly so, that the shares of the Buttabone Company rank as authorised investments of the trust funds, both under the will and the declaration of trust.

These being the relevant facts of the case the point for decision is capable of statement thus: Is the sum of £19,380 "net income or profits to be derived from such investment or investments," or is it "capital of my said trust estate"?

The question which thus arises is one which may frequently occur when investments, representing a settled trust fund, include shares in a limited company which are not restricted to a fixed rate of dividend. So long as such a company is a going concern and is not restricted as to the profits out of which it may pay dividends, it may distribute as dividends to its shareholders the excess of its revenue receipts over expenses properly chargeable to revenue account. The balance to the credit of profit and loss account may in many cases be divided as dividend even if the Company's capital account is in debit; and such a distribution by way of dividend would, *prima facie,* be "income or profits" of the trust share, and belong to the tenant for life; it would not be "capital of my trust estate." On the other hand, if the company instead of distributing the same balance as dividends, resolved upon liquidation, the shareholder would be repaid his share capital and in addition the share of surplus assets in the liquidation attributable to his shares. The moneys received by the shareholder in the liquidation may be swollen by reason of the fact that the company has in its possession undivided profits, but no part thereof would belong to a tenant for life as income; it would all be *corpus* of the trust estate.

From this it would appear that moneys paid in respect of shares in a limited company may be income or *corpus* of a settled share according to the procedure adopted, *i.e.,* according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up. Each process might appear to involve some injustice, the former to the remainderman, the latter to the tenant for life.

In truth the only method by which the rights of the respective *cestuis que* trust can be safeguarded and made incapable of being varied or affected by the conduct of the company, is

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by the insertion of special provisions in the trust instrument clearly defining the respective rights of income and *corpus* in regard to moneys received by the trustee from limited companies, in respect of shares therein held by him as part of the trust estate.

The learned Judge in the present case decided that the two sums in question should be treated as *corpus* and not as income. The grounds of his decision appear to have been that the answer to the question depended upon what was the intention of the Company in making the distribution, and that upon the whole of the evidence he came to the conclusion that the distribution was in fact, and was intended by the Company to be, a distribution of capital assets in anticipation of liquidation. He further held that in order to convert profits into *corpus* as between tenant for life and remainderman, no conversion by the company of the profits into share capital was necessary, but that profits distributed might be *corpus* as between tenant for life and remainderman, even though no part of the fund was retained by the company in a capitalized form. As regards this part of his decision he realized that such a view was in conflict with the judgment of Eve, J., in In re *Bates, Mountain* v. *Bates*[1], but he felt himself bound to consider the law as settled otherwise by reason of two decisions of the High Court of Australia, viz., *Knowles* v. *Ballarat Trustees*[2] and *Fisher* v. *Fisher*[3].

It will be necessary for their Lordships to consider these three authorities, and to decide which of them, in their view, is based on a correct interpretation of the law.

Before doing so it would seem advisable to draw attention to certain salient points relevant to the matter in debate.

(1) A limited company when it parts with moneys available for distribution among its shareholders, is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for *A* absolutely or as trustee for *A* for life only.

(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as

1. (1928) 1 Ch. 682. 2. 22 Comm. L.R. 212.
3. 23 Comm L.R. 337.

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a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus," or any other name, it still must remain a payment on division of profits.

(3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie*, belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the *corpus* of the trust estate there must be some provision in the trust deed which brings about this result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

(4) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

(5) The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case the amount of cash distributed disappears on both sides of the company's balance sheet. It is lost to the company. The fund of undistributed profits which has been divided ceases to figure among the company's liabilities; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished, but on the liabilities' side of the balance sheet (although the total remains unchanged) the item representing undivided profits disappears, its place being taken by a corresponding increase of liability in respect of issued share capital. In other words, moneys which had been capable of division by the company as profits among its shareholders have ceased for all time to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding up. The fully paid shares representing them and received by the Trustees are therefore received by them as *corpus* and not as income.

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Their Lordships now turn to the decisions which bound the learned Judge and formed the basis of his judgment. Inasmuch as much consideration was given by the High Court of Australia and before their Lordships' Board to the decision of the House of Lords in *Bouch* v. *Sproule*[4], it is advisable to consider what was the decision in that case and what was the basis upon which it rested. It is not, in their Lordships' view, an authority for the proposition that the company's statement of intention determines as between tenant for life and remainderman whether a sum paid away by the company to a shareholder who is a trustee is income or *corpus* of his trust estate. In *Bouch* v. *Sproule*[4] no moneys, in fact, left the company's possession at all. It is not an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but by its acts, showed that what the shareholders got from the company was not a share of profits divided by the company, but an interest in moneys which had been converted from divisible profits into moneys capitalized and rendered for ever incapable of being divided as profits. In those circumstances it was held that shares which were issued to a trustee shareholder, and which represented the moneys so capitalized, were as between his *cestuis que* trust *corpus* and not income, because the company had decided that the profits in question should be permanently added to the company's capital. Lord Watson stated the point concisely when he said:

"In a case like the present where the company has power to determine whether profits reserved and temporarily devoted to capital purposes shall be distributed as dividend or permanently added to its capital, the interest of the life-tenant depends in my opinion upon the decision of the company."

There is no decision in the Courts of this country which justifies the view that a person beneficially entitled in remainder to shares in a limited company, is entitled to any interest in profits lawfully distributed during the lifetime of the tenant for life by a company not in liquidation, and such a view is, their Lordships think, contrary to principle. The nearest approach to such a decision is to be found in the cases which are referred to in *Bouch* v. *Sproule*[4] and are commonly known as the Bank cases, of which one, viz., *Irving* v. *Houston*[5] is a decision of the House of Lords. They, however, are cases *sui generis*, not

4. (1887) 12 A.C. 385.
5. (1803) 4 Pat. App. 521.

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susceptible of easy explanation. As Lord Herschell said in *Bouch* v. *Sproule*,[4] *Irving* v. *Houston*[5] is

"an authority governing only a case similar in its facts, that is to say, a case where the company has no power to increase its capital, but has accumulated profits, and used them in fact for capital purposes, and afterwards distributes these profits among the proprietors."

In the case of *Knowles* v. *Ballarat Trustees*[2] the facts were that the directors of a limited company which was not in liquidation by resolution resolved upon the payment to the members of (1) a dividend of 6*d*. per share; (2) a bonus of 6*d*. per share; and (3) "distribution of assets 10*s*. per share." The holders of some shares in the company (who held them under a will upon trust for a tenant for life) having received these sums, applied to the Court to have it determined whether the 10*s*. per share was income or capital. The will contained no special provisions relevant to the question. The 10*s*. per share was paid out of accumulated profits. The High Court (Isaacs, J., dissenting) held that the moneys were capital of the trust estate, because though they were payments of cash made out of accumulated profits the company intended the moneys to be a distribution of capital as distinguished from dividends.

A careful consideration of the judgments delivered by the majority of the High Court Judges satisfies their Lordships that the decision is based upon the view that a company when dividing among its shareholders a sum of accumulated profit, is entitled to dictate and determine whether the moneys so received by the shareholder shall, in his hands, be deemed *corpus* or income. Their Lordships know of no earlier authority justifying this view. It is a matter with which the company has not the remotest concern. If payment to the shareholders is made out of profits it is income of the shares, and no statement of the company or its directors can change it from income into *corpus*. Their Lordships agree with, and are content to refer to, the dissenting judgment of Isaacs, J., as a correct exposition of the law.

Before parting with the *Knowles* case their Lordships desire to say a word in reference to In re *Armitage*[6] upon which reliance was placed by Griffiths, C.J. and Barton, J. The legal position in that case was quite plain. The old company had sold its assets (including accumulated profits) to the new company, for a price which produced surplus assets in the winding

2. 22 Comm L R. 212.
4 (1887) 12 A.C. 385 at 397. 5 (1803) 4 Pat App 521.
6. (1893). 3 Ch. 337

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up of the old company to the amount of £9 5*s*. 6*d*. for each share of the old company upon which only £8 per share had, in fact, been paid up. Upon no theory could it be said that any part of the £9 5*s*. 6*d*. was payable to the tenant for life. The moneys paid were all surplus assets distributed in a winding up and took the place in the trust estate of the shares themselves. The difference between the £9 5*s*. 6*d*. and the £8 was a profit to the trust estate, just as if the shares had been sold and had realized £9 5*s*. 6*d*. per share; but no part of the £9 5*s*. 6*d*. was income of the tenant for life.

The other decision of the High Court, *Fisher* v. *Fisher*[3] requires no additional discussion. The majority of the Judges followed their previous decisions in the *Knowles* case.[2] Isaacs, J. again dissented.

These were the two authorities which in the present case Long Innes, J. felt constrained to follow, in preference to adopting the reasoning of Eve, J. in the later case of In re *Bates, Mountain* v. *Bates*[1].

There the directors of a limited company had made payments to shareholders out of distributable profit, but had stated:—"It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution." Eve, J. held that the payments were income receivable by a tenant for life. This appears to their Lordships to be an authority directly applicable to the present case, and their Lordships find themselves in complete agreement with the learned Judge, both as regards his decision and the reasoning upon which it is based. Their Lordships desire to adopt the language used by Eve, J., and to say in regard to the fund out of which the sums of £19,380 and £8,360 were paid by the Buttabone Company to the Trustee Company:

> "Unless and until the fund was in fact capitalized, it retained its characteristics of a distributable property . . . and no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital It remained an uncapitalized surplus available for distribution either as dividend or bonus on the shares or as a special division of an ascertained profit and in the hands of those who received it it retained the same characteristics"

For these reasons their Lordships are of opinion that the two sums here in question should be treated as income and not as *corpus*. They are "net income or profits derived from such investment or investments"; they are not "capital of my said trust estate."

1. (1928) 1 Ch. 682. 2. 22 Comm L.R. 212.
3. 23 Comm. L.R. 337.

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Their Lordships desire to add that they see no reason for assuming that in making this distribution the directors had in mind any question of rights as between tenants for life and remaindermen beneficially interested in shares held by trustee shareholders. It may be that they had, but the wording of the circular letter of the 28th November, 1927, appears to their Lordships to indicate that the principal questions present to the minds of the directors were: (1) the relief of their shareholders from liability to pay income-tax on the profits distributed, and (2) section 4 (*g*) of the Income-tax Assessment Act, 1924.

Counsel for the respondents addressed to their Lordships a new and alternative argument. It was this. It was said that the distribution of 9*s*. 6*d*. per share out of profits arising from the sale of breeding stock could not have been made if the old Art. 122 of the company's had remained unaltered; that no alteration could have been made if the Trustee Company had voted against it; that in not voting against the alteration the Trustee Company has committed a breach of duty; that a breach of duty by a trustee cannot operate to alter the beneficial rights and interests of his *cestuis que* trust; and that as a matter of administration the Court would direct the Trustee Company to deal with the moneys so as to prevent the remaindermen from being prejudiced by being deprived of a fund of which they could not have been deprived if the Articles of Association had not been altered.

This would appear an unusual contention to be raised and determined upon an originating summons issued by a trustee; but it must fail in these proceedings because the basic allegation has not been proved, viz., that the distribution could not have been made under the old Art. 122. This is a question upon which (depending as it does upon the consideration of materials not before them), their Lordships express no conclusion.

Their Lordships are accordingly of opinion, upon the materials before them, that the two sums mentioned in the originating summons should be treated as income, and that the decree of the 12th November, 1928, should be varied by substituting the word "income" for the word "capital" in the first declaration therein contained and by substituting the word "income" for the word "*corpus*" in the second declaration therein contained, and they will humbly advise His Majesty accordingly.

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Their Lordships, however, feel that an opportunity should be given to any beneficiaries who may desire so to do, to assert in hostile litigation (and at their own risk as to costs and otherwise) a claim to have all or any part of the funds retained as capital upon the ground (as indicated above) that the dividend in question could not have been paid if Art. 122 of the Company's Articles of Association had not been altered.

Their Lordships accordingly think that a direction should be given to the Trustee Company not to pay over the moneys to the tenants for life before the 31st October, 1930. If in the meantime any action is commenced as above mentioned the trustees can apply in that action for directions as to how they should deal with the said moneys pending the decision thereof.

The costs of all parties of this appeal will be taxed as between solicitor and client and paid rateably out of the two sums in question in these proceedings.

Solicitors for appellants: *Montagues, Cox* and *Cardale.*

Solicitors for respondents: *Light and Fulton.*

S.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

P. V. S. Kabalamurthi Pillai .. *Plaintiff**

v.

P. V. Subramania Pillai and others .. *Defendants.*

Kabalamurthi Pillai v Subramania Pillai.

Receiver—Commission—Order of Court providing for percentage on "gross sales" of business—Right of receiver to claim commission on "trade discount," packing charges and freight.

In appointing two persons as joint receivers of a going business the Court provided by its order that they "do retain five per cent. on the gross sales in their hands as and for their remuneration". During the course of business goods had been sold for a certain figure but from that figure had to be deducted a sum by way of "trade discount" in order to arrive at the actual sale proceeds. A question having been raised as to the basis on which the remuneration of the receivers should be calculated,

Held, that the receivers were entitled to commission only on the actual sale proceeds, which might include freight and packing charges but not "trade discount."

Meaning of the expression "gross sale proceeds" discussed.

Semble—The receivers' commission is in truth the price of the work done by them. It must have some relation to the labour involved and the time taken.

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*C.S. No. 794 of 1921. 7th and 8th October, 1930.
(Application Nos. 3435 of 1929, 3155 of 1929 and 1319 of 1930.)

Kabalamurthi Pillai v. Subramania Pillai.

The facts of the case were as follows:—

In a suit filed for partition of joint family properties a consent decree was passed on the 1st of August, 1922. Under the decree the properties were divided into four shares. The 1st defendant, to whom the family condiments business was allotted, was made liable by the decree for certain specified debts which were burdened also on the properties that fell to the other sharers. In other words, the decree provided that the 1st defendant should indemnify the other sharers against the claims of the mortgagees over the properties. The 1st defendant not having discharged his obligations, the plaintiff applied for the appointment of a receiver and by two orders, dated February and August, 1924, the Court appointed two persons as joint receivers of the 1st defendant's business and his other properties. The object of the appointment was to carry out the provisions of the decree *inter alia* to work out the indemnity in favour of the plaintiff. The receivers' management of the estate for a period of five years proved unsatisfactory and one of the parties to the partition suit, namely, the 5th defendant, took out the present summons.

V. V. Srinivasa Aiyangar and *S. G. Satagopa Mudaliar* for plaintiff.

K. S. Krishnaswami Aiyangar instructed by *Ramaswami Aiyangar* and *Srinivasavaradachari* for 5th defendant.

G. Krishnaswami Aiyar, R. Ramachandra Chetty and *K. S. Rajagopala Aiyangar* for other defendants.

T. Rangachariar and *V. Pattabhiramayya* for the Receivers.

The Court delivered the following

JUDGMENT.—This summons is taken out by the 5th defendant. He applies that the receivers may either be removed or in the alternative suitable directions be given to them. After hearing the application very fully, I have come to the conclusion that they should be continued but that in the interests of the estate their duties should be more precisely defined than in the orders under which they were appointed. [His Lordship stated the facts and after dealing with the charges made against the receivers proceeded:]

By far the most important question that has been argued is, what is the amount of remuneration to which the receivers are entitled? The point really turns on the meaning of the expression "gross sales" in the Order of Court, dated 2nd June, 1925. Paragraph 13 of the Order reads thus:

"With regard to the condiments business the said receivers do retain 5 per cent. on the gross sales in their hands as and for their remuneration for the said condiment business."

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It was by the consent and at the request of the parties that this order was made. It must be read in the light of the affidavit filed then by the receivers. In that affidavit, they ask for a commission at 5 per cent. on the "gross sale proceeds". It is not disputed that the two expressions "gross sales" and "gross sale proceeds" are identical in their meaning and effect. Messrs. Fraser & Ross in their report point out that the commission retained by the receivers in respect of the business from the 18th of August, 1924 to the 31st of March, 1930 is Rs. 43,991-12-0. They have drawn this commission on the footing that they are entitled to 5 per cent. on what is shown as the amount of the "gross sales," namely, 9 lakhs odd. This concern had dealings mainly with two firms, Messrs. Sharwood & Co., England and Messrs. Fisher & Co., Australia. The goods were supplied to them on a large scale from time to time under subsisting contracts. The invoices made out against them mention certain figures as the price of the goods supplied and from those figures is deducted what is described in the report as "trade discount". This latter term comprises various items such as commission, bonus and discount. It is the aggregate of the total prices that reaches the figure 9 lakhs odd, to which I have referred. The "trade discount" amounts to about two lakhs and the actual proceeds received by the receivers is about 7 lakhs. The question is, are they entitled to commission on the 9 lakhs odd or only on the sum of about 7 lakhs? In my opinion the receivers are clearly not entitled to commission on the sum shown as "trade discount". "Proceeds" mean produce, outcome, profit. (*See* the Concise Oxford Dictionary.) An amount never received cannot be part of the proceeds. Whether from the point of view of the buyers or the sellers, the only figure that matters, is the amount actually paid and received. As Messrs. Fraser & Ross point out:

"It is usual in business concerns to quote list or catalogue prices and allow percentages off such prices to trade customers as trade discounts. Such discounts are deducted in the invoices themselves and are not brought into account in the financial books"

To seem to make a concession while in point of fact no concession is made or intended, is a devise which tradesmen usually employ. To take an instance, if you want to charge for an article Rs. 75 you may quote its price as Rs. 100 and allow a discount of 25 per cent.; or, you may quote Rs. 125 as its price with a discount of 40 per cent. In either case, the buyer pays and the seller receives only Rs. 75. So long as the buyer parts only with Rs. 75, it little signifies to him whether the price quoted is Rs. 100 or Rs. 125. The receivers' com-

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mission must not be made to depend upon the fictitious figure that they may choose to show as the original price of the article.

Moreover, the receivers' commission is in truth the price of the work done by them. It must have some relation to the labour involved and the time taken. Why should they receive remuneration in respect of an amount which is added in the first instance and then straightway deducted? So long as the buyer knows that he is paying only 7 lakhs, what matters to him whether the original price is shown as 9 lakhs, as in this case, or, say, 15 lakhs?

It has been suggested for the receivers that the very phrase "gross proceeds" involves that it is something distinct from net proceeds. Perfectly true; but you cannot, for sustaining this distinction, import a fiction and call a sum never received, as a part of the proceeds. Having regard to the nature of this business, the expression "gross sale proceeds" is extremely inapt and wholly unrelated to the facts of the case. The parties have used the words loosely without passing to think what they mean. The difference between the gross and the net sale proceeds is recognised in some of our enactments. For instance, in the Original Side Rules, O. 26, R. 4 makes the commission depend on what may be described as "gross sale proceeds". It says that the receiver may take his commission at 5 per cent. on sales calculated on the total value realised by him. On the other hand, O. 18, R. 6 provides that the Master may fix as the auctioneer's remuneration a percentage on the net sale proceeds. The same expression "net sale proceeds" occurs also in O. 34, R. 6, also R. 8-A, Civil Procedure Code. Let us take O. 34, R. 6. Where after the sale of a mortgaged property, there is still a balance due to the mortgagee, this rule says that the Court may pass a personal decree for the balance. It is on the basis of net sale proceeds the rule provides that the balance is to be computed. In these several instances, the "net proceeds" are something different from "gross proceeds". The mortgagee in the rule quoted above has no concern with the "gross sale proceeds". The expenses of the sale must be first deducted; and thus the net "sale proceeds" are arrived at. But in the present case, there are generally speaking, no expenses attending a sale at all. So, as I have said, the phrase "gross sale proceeds" is inappropriate and in any event cannot include an amount never received. Whether the phrase is suitable or not, the question really is, did the parties at the time they used it, intend that the commission should be paid on a fictitious

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sum, an amount that was never to come? In my opinion, the answer must clearly be in the negative.

The report points out, that the receivers have charged commission also on packing charges and freight, which are treated as part of the price. I can give effect, if necessary, to the phrase "gross sales" by holding that they are entitled to remuneration on these two items. Strictly, in my opinion, they cannot charge commission on freight; it is paid at one end and recovered at the other. But still the term used being "gross proceeds" as the freight is a part of the sum they received, I am prepared to allow them commission on this head. In the result, they may retain commission on freight and packing charges but not on "trade discount".

I have discussed this point at some length, as the sum involved is upwards of Rs. 10,000. On my finding, the receivers are accountable for this sum, being the excess received by them. I do not propose to direct them to bring back this sum, but it will be treated as a debt due by them to the estate to be adjusted against any future commission they may earn.

In the result, I have decided not to remove the receivers but to give them the following directions: [His Lordship gave the necessary directions and also passed orders regarding costs.]

B.V.V. *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Chinna Venkatesu .. *Petitioner** (*Accused*)

v.

Pedda Kesamma .. *Respondent* (*Complainant*).

Chinna Venkatesu v. Pedda Kesamma.

Indian Penal Code (*XLV of* 1860), *S.* 447—*Criminal trespass—Intention to annoy—Presence of the party in possession unnecessary*

In order to fix the accused with an intention to annoy it is not necessary that the party in possession of the property should be actually present on the property at the time of the trespass.

Chinna Thoyi, In re, (1895) 1 Weir 518, distinguished

Emperor v *Moti Lal,* (1925) I.L.R. 47 All. 855, referred to

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the

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*Cr. Rev Case No 979 of 1929. 15th September, 1930.
(Cr. Rev. Petition No. 883 of 1929)

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judgment of the Court of the Sub-Divisional 1st Class Magistrate of Gooty in Criminal Appeal No. 39 of 1929 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tadpatri in C.C. No. 112 of 1929.

S. Ranganadha Aiyar for petitioner.

T. R. Arunachala Aiyar for respondent.

A. Narasimha Aiyar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the conviction of the petitioner under section 447, Indian Penal Code, for criminal trespass for entering upon and ploughing up a field called Tunga Chenu, 2 acres 75 cents in extent, belonging to P.W. 1 and leased by her in Fasli 1339 to P.W. 5. The petitioner seems to have set up that he was the person in possession. This was found against, the findings being that the petitioner and the husband of P.W. 1 were two out of five brothers who had once been joint but had subsequently divided off, that these two brothers had divided from each other about four years prior to this occurrence and that the widow, P.W. 1, had been in possession of this property since her husband's death and had paid the kist for it and had also in Fasli 1339 leased it by a registered instrument to P.W. 5 for five years. The petitioner was convicted upon these facts upon the inference of the Lower Courts that his intention in entering upon and ploughing up the field was to cause annoyance to P.W. 5. The petitioner now attacks this conviction upon two grounds. In the first place, he says that there is no distinct finding that there was any intention to annoy P.W. 5. In the second place he says that, even if there were, such a finding would be incorrect because P.W. 5 being admittedly the person in possession at the time when the petitioner entered upon the property, he being then absent and only P.W. 1 being present on the property, there could be no possible intention to annoy an absent person.

As to the first point, I think the language of the Magistrates is clear and they expressly found that the petitioner's intention was to annoy P.W. 5. As to the next point, reliance is placed upon three decisions to show that, where a person in possession is absent, there cannot really or fairly be said to be any intention to annoy him, and the intention whatever it may be, is not to annoy, but may be to assert a right or something else. The first decision relied upon is In re *Chinna Thoyi*[1]. In

1 (1895) 1 Weir 518.

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that case a woman had entered the compound of the Assistant Superintendent of Police in his absence for the purpose of meeting her paramour and not for the purpose of stealing as was alleged. On those facts the Court held that there was no reason for supposing that the woman's entry into the compound was made with the object of intimidating, insulting or annoying the absent Superintendent of Police or any other person. I consider that to be a decision upon those facts and not a general decision that in no circumstances can an absent possessor be annoyed even if facts exist from which such an inference may be drawn. On the contrary, another of the decisions cited to support this proposition, *Emperor* v. *Moti Lal*,[2] contains observations which are to the opposite effect. In that case, there were two rival claimants, *A* and *B*, to some immoveable property, including a certain shop. *A* had let the shop to a tenant who had left it. On the same day, before the lessor *A* could himself take possession, *B* entered the shop; and the question was whether that was criminal trespass. In the course of their judgment, the learned Judges say:

"First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as, for instance, the actual owner, his wife, servant, agent, licensee or other person They are at all events results which more naturally follow when premises are occupied than when vacant."

The actual result of the case was that the Court held that the entry was a *bona fide* one for the purpose of asserting his title. But the observations above set forth show that it is unnecessary for a possessor to be always present upon his property in order that he may be annoyed by a trespasser; on the contrary it was recognised that the actual owner need not be there—his wife, servant, agent, licensee or other person may be there. If so, why should any human being be actually present? Indeed, if that were the case, no person in possession of property could leave the property without the risk of some trespasser or intruder entering upon his premises and going scot free upon the allegation that there was nobody to annoy. The learned Judges in the case cited merely observed:

"They (intimidation, insult and annoyance) are at all events results which more naturally follow when premises are occupied than when vacant."

In my opinion that stands to reason. Can it be pretended, if a man in Madras locks his house and goes for a walk to the Beach and comes back a few hours or minutes later, that any

2. (1925) I.L.R. 47 A. 855.

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one who enters his house in his absence in circumstances from which intention to annoy may be otherwise drawn, cannot be guilty of criminal trespass because he was absent? The proposition has only to be so stated to show how absurd the result will be if that were the law. The only other case relied upon was the Full Bench decision in *Vullappa* v. *Bheema Row*[3]. That was not a decision on this point at all. All that was decided there was that the essence of an offence under section 441 is the intention to commit an offence—to intimidate, insult or annoy. It was held that it was not sufficient to prove that the offender knew that his act was calculated or likely to cause annoyance, insult or intimidation. That is not the question here, that question as stated having been actually found. I therefore think that the fact that P.W. 5 was absent when the petitioner entered upon the land and that only the lessor came to the spot on hearing of the petitioner's acts in order to prevent his doing so is not enough to exonerate the petitioner from the intention to annoy the lessee. The conviction, therefore, was right.

In deciding as to the sentence, in my opinion a fine of Rs. 100 is far too excessive in a case of this kind. The dispute was between a person and his brother's widow; and there was no necessity to visit this petty offence with such a heavy fine. The sentence will be reduced to a fine of Rs. 20, in default one week's simple imprisonment. The rest of the fine, if paid, will be refunded.

S.R. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Vellachami Chetti .. *Appellant** (*Petitioner*)

v.

Arunachalam Chetti (dead) and others .. *Respondents* (*Respondents*).

Vellachami Chetti v. Arunachalam Chetti.

Provincial Insolvency Act (V of 1920), S. 43—Application for extension of time by insolvent—Refusal of—Annulment—Propriety.

The penalty of annulment under S. 43 of the Provincial Insolvency Act is hardly appropriate in the case of an insolvent who comes before the Court in time and applies for extension of the time fixed for his application for discharge.

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*A.A.O. No. 537 of 1925 17th November, 1930.

3. (1917) I.L.R. 41 M 156 : 33 M.L.J. 729 (F.B.).

Vellachami Chetti v. Arunachalam Chetti.

Appeal against the order of the District Court of West Tanjore at Tanjore, dated 28th April, 1925 in I.A. No. 13 of 1925 in I.P. No. 10 of 1924.

K. Chandrasekharan for *C. A. Seshagiri Sastri* for appellant.

R. Gopalaswami Aiyangar and *S. R. Muthuswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—The insolvent in this case within the time fixed for his application for discharge applied for extension of that time. The learned District Judge refused to grant an extension and annulled the adjudication. The latter part of his order, annulling the adjudication, does not appear to us to have been proper. The insolvent, though he may not have applied for discharge in so many words, had submitted himself to the Court and expressed his desire to apply for a discharge, an application which would involve the investigation and consideration of his conduct by the Court. As the learned District Judge was not prepared to extend the time, he might properly have treated the insolvent's application for time as an application for discharge or should have allowed the insolvent to make an immediate application for discharge, if that was thought formally necessary. The penalty of annulment under section 43 of the Act does not appear to be intended for insolvents who come before the Court in time and submit themselves to the discipline of the Court.

But the learned Judge was right in his view that this was not a case for immediate discharge. Indeed absolute discharge could not have been granted under the Act.

The order of annulment is set aside and the petition is remanded to the District Judge, who should now consider on what conditions, if any, the insolvent should be discharged.

There will be no order as to costs in this appeal.

S.R. *Petition remanded.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—VISCOUNT DUNEDIN, SIR LANCELOT SANDERSON AND SIR BINOD MITTER.

Maharaja Sir Mohammad Ali Mohammad Khan, Khan Bahadur .. *Appellant**

v.

Musammat Bismillah Begam and another .. *Respondents.*

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Civil Procedure Code (V of 1908), O. 21, Rr 58, 63—Suit by defeated claimant—Onus of proof—Wakf and deed of gift in favour of judgment-debtor's wife—Fictitious transactions—Deeds never given effect to or acted upon.

The appellant, in execution of a money-decree, attached certain immoveable property, alleging that the same belonged to the judgment-debtor. The judgment-debtor's wife preferred a claim, under O. 21, R. 58, Civil Procedure Code, on the ground that, as to a portion of the property, it was a wakf, and as regards the remaining portion, that it had been transferred to her by the judgment-debtor in lieu of her dower. Her claim having been dismissed by the Executing Court, under O. 21, R 61, on the ground that the wakf deed and the deed of gift were merely fictitious documents created with a fraudulent intention and that the judgment-debtor and not she was in possession of the said property, she brought the present suit, under O. 21, R. 63, for a declaration that the said deeds were valid and that the property covered thereby was not liable to attachment and sale

Held, (1) that the *onus probandi* was upon the plaintiff (the judgment-debtor's wife) to establish by cogent evidence that the deeds in question were *bona fide* and were intended by the judgment-debtor to pass the beneficial interest in the premises in favour of the mutwalli of the wakf and the plaintiff respectively,

(2) that, on the evidence, the plaintiff had failed to discharge the burden of proof; that the deeds did not represent genuine transactions; that there was never a *bona fide* intention on the part of the judgment-debtor to make the wakf and the gift, and that the same were never given effect to or ever acted upon, and that the deeds were executed merely with a view to defeat or delay the appellant's claim against the judgment-debtor, and

(3) that the plaintiff's suit was, consequently, liable to be dismissed *in toto.*

Judgment of the Chief Court, Oudh, reversed.

Appeal No. 63 of 1928 from a decree, dated the 11th February, 1927, of the Chief Court of Oudh at Lucknow, which varied a decree, dated the 31st May, 1926, of the Subordinate Judge of Mohanlal Ganj, Lucknow.

The material facts of the case are sufficiently fully set out in their Lordships' judgment.

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*P.C Appeal No 63 of 1928
Oudh Appeal No 13 of 1927 — 24th July, 1930.

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Sir Binod Mitter.

Dunne, K.C. and *Wallach* for appellant.

L. M. Jopling for respondents.

24th July, 1930. Their Lordships' judgment was delivered by

SIR BINOD MITTER.—This is an appeal from a decree of the Chief Court of Oudh, dated the 11th of February, 1927, which varied a decree of the Subordinate Judge of Mohanlal Ganj, Lucknow, dated the 31st of May, 1926, and decreed in part the plaintiff's suit with costs.

The appellant, on the 4th November, 1921, instituted a suit against Haji Siddique Hasan (hereinafter referred to as defendant No. 2) to which suit the plaintiff-respondent No. 1 (who is the wife of defendant No. 2) was not a party, for the recovery of money partly as damages for breach of contract and partly by way of recovery of advances made to defendant No. 2 for the purchase of goods as commission agent. This suit was decreed for a sum a little over Rs. 24,000 on the 25th February, 1924, but on appeal was reduced by about Rs. 4,000.

After the appellant had obtained his decree in the first Court and whilst an appeal was pending, the appellant, as decree-holder, attached plots Nos. 44, 44-*a*, 45 and 46 situated on the New Sanitary Road, Lucknow, with buildings thereon, in execution of his decree, alleging that the same belonged to defendant No. 2. The present plaintiff (his wife) claimed under O. 21, R. 58 of the Code of Civil Procedure, that these plots were not liable to attachment as a portion of the plot No. 45 and the whole plot No. 46 was *wakf* property, and the remaining portion, *i.e.*, a portion of the plots Nos. 45 and 44, had been transferred to her in lieu of her claim for dower. Her claim was dismissed* under the provisions of O. 21, A. 61 of the Code of Civil Procedure, on the 26th January, 1925, on the ground that the *wakf* deed and the deed of gift were merely fictitious documents created with a fraudulent intention and that the defendant No. 2 and not the plaintiff was in possession of the said plots with the buildings thereon.

Plaintiff thereupon instituted the suit out of which this appeal arises on the 12th February, 1925, against the defendants for a declaration that the deed of *wakf* and deed of gift, dated the 19th November, 1916, and 30th June, 1917, respectively are valid and that the said premises were not liable to attachment and sale.

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*By Mr E Bennett, Additional District Judge, Lucknow.—K.J.R.

The learned Subordinate Judge came to the conclusion that the *wakf* and the deed of gift did not represent genuine transactions, that there never was a *bona fide* intention on the part of defendant No. 2 to make the *wakf* and the gift, and that the same were never given effect to. He further held that these documents were executed to defeat any claim which the appellant might make against defendant No. 2, and that the plaintiff was not entitled to the relief she claimed in the suit.

The learned Judges on appeal in the Chief Court reversed that judgment and hence this appeal.

Defendant No. 2 was a *tahsildar* of the appellant on a small salary until the year 1912, when he went on a pilgrimage to Mecca, and after his return from the pilgrimage he was employed by the appellant till 1921 as a commission agent to purchase grain and other articles for the appellant's estate and was paid remuneration at the rate of 1 anna in the rupee on the price of the commodities purchased, and also his expenses. In the course of his employment as commission agent large sums of money from time to time were advanced by the appellant to him for the purchase of goods and these sums and the amounts due to him for goods supplied were entered in the account books of the appellant's estate, but he had control over a portion of such sums and could draw upon the same.

In March, 1913, the defendant No. 2 purchased the said plots Nos. 45 and 46 which adjoined a ruined mosque. After his purchase, with the sanction of the Municipality, he erected buildings on a portion of plot No. 45 and on plot No. 46 at a cost of about Rs. 15,000, and also erected a new mosque, which he alleged cost him Rs. 2,000, and thereafter on the 12th August, 1915, he informed the secretary of the Municipal Board of Lucknow that he had transferred the said premises to his wife, *i.e.*, the plaintiff, and requested the secretary to put the plots in her name in place of his own in the office records. The secretary gave effect to this request on the 2nd October, 1915

On the 19th November, 1916, defendant No. 2 by a registered document purported to create a *wakf* of a portion of plot No. 45 and of plot No. 46 with the buildings which had already been erected thereon and appointed himself a *mutwali*

On the 20th April, 1920, the plaintiff wrote to the Municipal Board alleging that she herself had purchased plots No. 45 and 46 for Rs. 735 and that the same should be conveyed in favour of her husband, defendant No. 2. He vouched the correctness of her allegations in the application. In pursuance

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of her request a formal registered deed of transfer was duly executed in favour of defendant No. 2 as the absolute owner on the 14th May, 1921.

Plot No. 44 was originally purchased in March, 1913, by one Baqar Husain, who, by an application, dated the 9th April, 1913, to the Municipal Board, had this plot transferred to his brothers Haidar Husain and Ahmad Beg. They executed a registered sale deed of this plot in favour of defendant No. 2 but no conveyance was ever executed by the Municipal Board with reference to the plot. He obtained sanction from the Municipal Board to build on this plot.

Under O. 21, R. 63 the decision in the said claim proceedings was final subject to the result of this suit which the plaintiff instituted for a declaration that the deeds are valid and that the said properties are not liable to be attached in execution of the decree of the appellant. In their Lordships' opinion she is not entitled to this declaration unless she establishes to their satisfaction that the deeds in question were *bona fide* and were intended by defendant No. 2 to pass the beneficial interest in the premises in favour of the *mutwali* of the *wakf* and the plaintiff respectively.

Their Lordships will first consider the validity of the deed of gift.

Plaintiff was married to defendant No. 2 about 1898 or 1899. It is alleged that the dower was fixed at Rs. 30,000. No *kabirnama* is produced to corroborate the allegation as to what amount, if any, was fixed for the dower.

Defendant No. 2 later on married another lady, and certain properties known as *kakoori* properties, which were the only immovable properties which defendant No. 2 had in 1909, were alleged to have been given to her by way of dower, so that from 1909 he possessed no immovable property.

Plaintiff's case is that she had been pressing for the payment of her dower from 1909 but nothing seems to have been done till the time when the deed of gift was executed in 1917. Without expressing any opinion as to whether a *kabirnama* is usual or not where the dower fixed is a large sum of money, their Lordships feel that it is incumbent on the plaintiff to prove by cogent evidence that the dower remained unsatisfied until 1917, nearly 19 years after her marriage. The evidence on this point is entirely oral and the only persons who spoke to it were the plaintiff and her husband, defendant No. 2. There

is no corroboration of their evidence on this point from any other evidence and they are both interested parties. Defendant No. 2 was examined before the Trial Judge and he wholly disbelieved him, nor did he accept the evidence of the plaintiff, who was examined on commission. It will serve no useful purpose to go into any detailed examination of their evidence, but the same has been placed before their Lordships with great care by the learned counsel who appeared for the appellant and the plaintiff-respondent. Their Lordships are clearly of opinion that the evidence of the plaintiff and defendant No. 2 on this point, as also on all material points, is wholly untrustworthy. They, therefore, hold that the story of the unsatisfied dower is untrue.

The evidence of the plaintiff and her husband is that she spent Rs. 5,000 or Rs. 6,000 in erecting certain structures on the plot of land which was vacant at the time of the deed of gift, and that the money spent was found by the sale of her jewellery. The evidence on this point is extremely discrepant and highly improbable and unsatisfactory. No person to whom it is alleged the ornaments were sold has been called to corroborate this story. Their Lordships are unable to accept the evidence as to the way in which the ornaments were sold and the sale proceeds realised and spent in erecting the structures under the supervision of her son-in-law Mukhtar Mohammad. This witness was examined before the Trial Judge, who disbelieved his evidence. Their Lordships are also of opinion that this witness is untrustworthy, and they do not believe the story that the structures were erected on the vacant portion of the property given to her out of the proceeds of the sale of her jewellery. A portion of plot No. 45 forms the subject-matter of the gift, and it is a noteworthy fact that on the 20th April, 1920, she alleged that she herself had purchased plots Nos. 45 and 46 for Rs. 735, for which she alleged that she held a receipt. No such receipt has been exhibited in this case. In the conveyance of plots Nos. 45 and 46, executed on the 14th May, 1921, it is also stated that she herself had originally purchased the said premises, and it is difficult to see why, if plot No. 45 had been purchased by her, a gift of it should or could have been made to her by her husband in 1917.

By 1917 defendant No. 2 had denuded himself of all his savings, movable or immovable, and their Lordships cannot believe the statement of defendant No. 2 that he intended to part with the only property of which he was possessed in favour of the plaintiff.

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Defendant No. 2 from 1913 was carrying on a business which to a certain extent was of a hazardous character, and he had the opportunity of utilising the money of the appellant for his own purposes, and the effect of this deed of gift certainly would be to defeat or delay any claim which defendant No. 2 might have at any time against him. Their Lordships are of opinion that defendant No. 2 was always the true owner and in possession of the property which was the subject-matter of the gift from the time of his purchase in 1913 and 1915 respectively, and that this deed was false and fraudulent. The suit on this point therefore fails.

Their Lordships will next consider the evidence with regard to the *wakf* which comprised plot No. 46 and a portion of plot No. 45.

The deed of *wakf*, of which defendant No. 2 is now the *mutwali*, and the deed of gift are intimately connected with each other. Their Lordships have already held that the evidence of the plaintiff and defendant No. 2 is false with respect to the deed of gift and, in their opinion, their evidence with regard to the deed of *wakf* must be approached with great suspicion and subjected to the strictest scrutiny. The fact that the deed of gift is a false and fraudulent transaction does not by itself prove that the deed of *wakf* is also false and fraudulent but it does throw upon the plaintiff a heavy burden to prove that the same was a *bona fide* document and not executed with a view to defeat or delay the claims, if any, of the defendant No. 1 upon defendant No. 2.

Defendant No. 2 paid a substantial portion of the purchase money and there is no evidence as to who paid the balance. The defendant No. 2 must have done so as the plaintiff did not suggest till April, 1920, that she had paid the whole of the purchase-money herself—a story which is obviously false, as the defendant No. 2 paid by his own cheque a portion of the purchase-money. From the 2nd March, 1913 to the 12th August, 1915, the name of defendant No. 2 appeared in the records of the Municipal Board as the purchaser. Their Lordships have already adverted to the fact that on the last mentioned date he informed the Municipal Board that he had transferred the same to his wife and requested that her name be substituted for his in the office records. This request was acceded to on the 2nd October, 1915. He had, however, executed no document in her favour. His explanation is that he had fallen ill and had made an oral will in her favour. Their Lordships agree with the Trial Judge

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that this story of the oral will is untrue. It is noteworthy that the letter of the 12th August, 1915, does not in any way indicate how the transfer had been made, but in 1916 he executed the *wakfnama*, treating the property as his own.

In 1920 the following application was made to the Municipal Board:

"The Secretary,
Municipal Board,
Lucknow.

"SIR,

With compliments, I purchased plots Nos. 45 and 46 situate on the Ganga Prasad Road, when the road was being opened, from the Municipal Board, for Rs. 735, for which I hold receipt. But formally no sale deed was executed; therefore through this application I inform you that a sale deed in respect of the plots mentioned above be got executed in favour of my husband, Moulvi Mohammad Siddique Hasan Saheb. Whatever costs may be incurred shall be accepted by me. The said Moulvi Saheb also agrees to this transfer, and I shall be obliged.

Yours obediently,
(Sd.) Bismillah Begam, wife of Moulvi Mohammad Siddique Hasan Saheb, Tahsildar, of Ganga Prasad Road. (Autograph)

20th April, 1920."

"I put it in writing that I agree to this application word for word, and I accept the transfer of the plots mentioned above in my favour.

(Sd) Siddique Hasan." (In English)

Defendant No. 2 was cross-examined with regard to this document before the Trial Judge and he stated that "the signature on both these papers" (meaning thereby this document and Exhibit A-16) "were made when these papers were blank and I made over the papers to Abdul Baqi so that he might put in an application for the execution of the sale deed by the Municipal Board and get the deed after its execution."

He denied the plaintiff's signature on this document but could give no reason why her signature should have been forged on the original document. His evidence on this point in the claim proceedings has also been exhibited. Their Lordships consider his evidence on this point to be untrustworthy.

Exhibit A-16 is a copy of the receipt by him for the sale deed in respect of the *wakf* properties, and their Lordships do not accept his story that Ex. A-16 was handed over to Abdul Baqi in blank and that the latter was not told as to who had bought the land and in whose name. He stated in his evidence in this suit as follows:—

"The sum of Rs. 11,000 or so which was left with me after the sale of the ancestral property as stated above was entrusted by me to Haji Ejaz Ali, my cousin. I did not take any receipt or other writing from him about the money. He made a note of it in his account register. He used to keep accounts."

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The account register referred to has not been produced, nor is there any corroboration of this story. In his evidence in the suit he said that he did not spend any money out of his earnings as commission agent for the buildings, but in the claim proceedings he stated that the balance of the money came from the commission agency of the Mahmudabad estate. His evidence in the claim proceedings, which has been exhibited in this suit, differs from his present evidence in many material particulars.

His evidence that he realised Rs. 4,000 or Rs. 5,000 by the sale of his own ornaments to Sakhawat Ali does not commend itself to their Lordships. According to his own admission, he was only earning Rs. 100 or Rs. 125 per mensem from the commission agency business, and his personal expenses and those of his wife came to under Rs. 75 per mensem. He was not able to give any explanation worthy of serious consideration as to how he found the money spent in erecting the building.

It is, however, strenuously urged before their Lordships by plaintiff's counsel that the advocate for the appellant admitted in the Trial Court that the money of the appellant over which he had control, as a commission agent, was never misappropriated by defendant No. 2, and therefore it is not open to the appellant to make any suggestion that he utilised any portion of such money for the purposes of the construction of any of the buildings. The actual statement of the appellant's advocate in the Trial Court is as follows:—

"It is not defendant No. 1's case that the deeds of gift and *wakf* were executed fraudulently by reason of misappropriation of the estate money made by defendant No 2 during the years in which the said deeds were executed Our case is that the defendant No. 2 used to handle large sums of money belonging to the estate—money which came into his hands as Tahsildar or money which used to be advanced to him as Commission Agent

"There were always balances in favour of the estate and against defendant No 2. The defendant No 2's motive in executing the deed of *wakf* and the deed of gift was to save his property from being made liable in case the estate at any time tried to recover money left with him."

Counsel for the appellant here submitted that this admission merely meant that the appellant was not taking on himself the burden of proving that any particular sum of money belonging to the appellant was spent by defendant No. 2 in constructing the buildings, but he submitted that the admission of the advocate in the Trial Court did not preclude him from arguing that defendant No. 2 could not possibly have erected the buildings out of his own money. Their Lordships do not believe that the defendant No. 2 spent the said Rs. 15,000 out of the

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balance of the sale proceeds of his immovable property or his jewellery.

The conveyance of 14th May, 1921, transferred the property absolutely to defendant No. 2, his heirs and representatives, and there is no reference whatever in it that a portion of the properties was *wakf*.

Plaintiff has relied on Ex. 48 as proving that the defendant No. 2 was spending money out of the income of the *wakf* for purposes of *wakf*, but it is a document in his handwriting. Chittas in support of it have not been produced or proved. The Trial Judge found that Ex. 48 is not a genuine memorandum of accounts, nor did he believe the evidence of defendant No. 2 that the chittas had been lost. There is no independent corroboration from other evidence or documents that Ex. 48 was a genuine memorandum of accounts or that the chittas had been lost. The proof of its genuineness or of the loss of the chittas therefore depends largely upon the evidence of defendant No. 2 and as their Lordships cannot place any reliance on his evidence, they are unable to hold that the findings of the Trial Judge on these points were not proper findings and their Lordships are not satisfied that the plaintiff or defendant No. 2 ever gave effect to the *wakf* or to the deed of gift. The plaintiff, and not the defendant No. 2, at the time of the execution of the deed of *wakf* was the ostensible owner of the properties covered by the deed. Although he executed the deed in 1916 and became on its execution the *mutwali* of the same, yet in 1921 he procured the conveyance of the properties in his own name. If he had really intended to create a *wakf*, it is difficult to see why the conveyance was not executed in his favour as a *mutwali*.

On a careful consideration of the whole evidence, their Lordships have come to the conclusion that defendant No. 2 executed the deed of *wakf* but without any intention of divesting himself of his ownership of the property, and that his real intention was to utilise the document should it become necessary as a shield against any claims that the appellant might have against him either then or at any future time. Their Lordships are therefore of opinion that this appeal should be allowed and the decree of the Subordinate Judge should be restored and that the appellant should have his costs in the Chief Court and of this appeal. They will therefore humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak*.

Solicitors for respondents: *Watkins and Hunter*.

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

Musammat Saraswati Bahuria .. *Appellant**

v.

Surajnarayan Chaudhuri and others .. *Respondents.*

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Mt. Saraswati Bahuria v. Surajnarayan Chaudhuri.

Revenue sale—Arrear of revenue—Period fixed for payment—Sale held before expiry of period—Validity—Bengal Land Revenue Sale Law Act (XI of 1859), Ss. 2 and 3 and Government Notification thereunder.

The plaintiff's share in an estate was sold on account of her alleged default in the payment of the *chait kist* or instalment of revenue. It appeared that the said *kist* was payable on the 28th March, 1919, that by reason of S. 2 of the Bengal Land Revenue Sale Law Act (XI of 1859) the said *kist* did not become an arrear of revenue until the 1st April, 1919, and that the latest date for the payment of such arrear of revenue as fixed by a notification issued by the Government in pursuance of S. 3 of the said Act was the 7th June, 1919. The sale in question having been held on the 6th June, 1919, the plaintiff sued to have it set aside

Held, that the estate was not liable to be sold until the expiration of the last day for payment, namely the 7th June, 1919, and consequently the sale was invalid and must be set aside.

Decision of the Patna High Court reversed.

Appeal No. 35 of 1928 from a judgment and decree of the High Court, Patna, dated the 19th February, 1925, reversing a judgment and decree of the Subordinate Judge of Darbhanga, dated the 25th June, 1921.

Abdul. Majid for appellant.

Respondents unrepresented.

13th January, 1931. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiff in the suit from a judgment and decree of the High Court of Judicature at Patna, dated the 19th February, 1925, which reversed a decree of the Subordinate Judge of Darbhanga, dated the 25th June, 1921.

The delay in the disposal of this appeal is accounted for by the fact that the appeal was dismissed for want of prosecution on the 4th November, 1926, and it was not until the 22nd March, 1928, that by an order of His Majesty in Council the appeal was restored upon certain conditions therein specified. The appellant's case was lodged in April, 1928; the respondents, however, did not file a case and were not represented at the hearing of this appeal.

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*P.C. Appeal No. 35 of 1928 13th January, 1931
Patna Appeal No. 11 of 1925

The suit was brought by the plaintiff, a *purdanashin* lady, to set aside the sale of a certain share of Mauza Ladugaon, which took place on the 6th June, 1919, by reason of alleged arrears of revenue, for recovery of possession of the said share and for mesne profits.

It was alleged that the plaintiff's share in the said village was 5 annas 10 gandas, and that the second and third defendants, Bedanand Thakur and Lachhmi Kant Thakur, together with other persons, were the owners of the other share in the said village.

It was further alleged that the above-mentioned two defendants had purchased the plaintiff's share in the said village in the name of their relation, the 1st defendant, Suraj Narayan Chaudhuri, at a grossly inadequate price, viz., Rs. 1,350, the real value of the plaintiff's share being at least Rs. 16,000.

There were nine issues raised at the trial, but it is necessary to refer to two only—for the purpose of disposing of this appeal.

(1) The plaintiff alleged that the second and third defendants had acted fraudulently and in collusion with the plaintiff's *patwari* and had bribed him to allow the payment of revenue to become in arrear, so as to bring the plaintiff's share to sale. Both the Courts in India held that the plaintiff had failed to prove her case of fraud and collusion, and the learned counsel who appeared for the plaintiff at the hearing of this appeal did not contest the correctness of that finding.

(2) The other issue, to which reference is necessary, was numbered 4 in the Trial Court and was as follows:—

"Whether the sale was held in absence of arrears of Government revenue as alleged."

The Subordinate Judge found this issue in favour of the plaintiff and directed that the suit be decreed with costs, that the plaintiff should recover possession of the said share in the village on depositing the amount of consideration within one month and that the amount of mesne profits should be ascertained at a later stage.

The defendant, Suraj Narayan Chaudhuri, appealed against the above-mentioned decree to the High Court at Patna, making the plaintiff and the second and third defendants respondents.

The learned Judges of the High Court held that there was an arrear of revenue, in respect of which the share of the plaintiff was liable to be put up for sale, and that the sale of the 6th June, 1919, was valid.

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They therefore allowed the appeal, set aside the decree of the Subordinate Judge and dismissed the plaintiff's suit with costs.

The plaintiff's case in respect of the above-mentioned issue was that her share in the property was sold on account of her alleged default in the payment of the *chait kist*, or instalment, that the said *kist* was payable on the 28th March, 1919, that by reason of section 2 of Act XI of 1859* the said *kist* did not become an arrear of revenue until the 1st April, 1919, and that the latest date for the payment of such arrear of revenue fixed by the Government in pursuance of section 3 of the said Act was the 7th June, 1919. Consequently, it was contended that the Collector had no jurisdiction to put up the property for sale on the 6th June, 1919.

Their Lordships have examined the documents in this case, which include the Land Revenue and Road Cess and Process Tauzi Ledger, and the Land Revenue Tauzi Roll relating to the estate in question.

It appears that there was a separate account in respect of the plaintiff's share, and the revenue in respect thereof was payable in four instalments, viz., the 7th June, the 28th September, the 12th January and the 28th March.

The alleged arrear of revenue, in respect of which the plaintiff's share was sold, was Rs. 45-7-3, and in their Lordships' opinion there is no doubt that the above-mentioned sum was due in respect of the March *kist* and was payable on the 28th March, 1919.

This sum, however, did not become an arrear until the 1st April, 1919, because, by section 2 of Act XI of 1859, it is provided that:

"If the whole or a portion of a *kist* or instalment of any month of the era according to which the settlement and *kistbundee* of any *mehal* have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue."

The question then arises, when did the plaintiff's share become liable to be sold for default in payment of the said arrear of revenue.

Section 3 of the said Act provides as follows:—

"Upon the promulgation of this Act, the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue and all demands which, by the Regulations and Acts in force, are directed to be realised in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder. And the said Board shall give notice of the

*Bengal Land Revenue Sale Law Act

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so fixed in the official Gazette, and shall direct corresponding publi- , to be made, as far as regards each district in the language of that .ct, in the Office of the Collector or other Officer duly authorised to .. sales under this Act, in the Courts of the Judge, Magistrate (or .nt Magistrate, as the case may be), and Moonsiffs, and at every Thannah .ion of that district; and the dates so fixed shall not be changed except the said Board by advertisement and notification, in the manner above described, to be issued at least three months before the close of the official year preceding that in which the new date is, or dates are, to take effect.''

Their Lordships' attention was drawn to the notification issued by the Board of Revenue at Calcutta in pursuance of the above-mentioned section 3, dated the 6th August, 1910 (published in the *Calcutta Gazette* of 1910) which it was stated was applicable to the area in question and which runs as follows:—

''In pursuance of section 3 of the Bengal Revenue Sales Act (XI of 1859) and in supersession of all previous orders on the subject, the Board of Revenue notify that the following are the latest dates for the payment of arrears of revenue and of demands which are recoverable as arrears in default of which payment the estates in arrear will, except as provided in the said Act, be sold by public auction to the highest bidder.

''(1) In the following areas.''

The entries in the said notification material to this case are as follows:—

Area.	*Latest dates for payment.*	
In districts where the Fasli era prevails.	Estates paying an annual revenue exceeding Rs. 100.	7th June. 28th September 12th January 28th March.

The estate in question is in a district where the Fasli era prevails and the annual revenue exceeded Rs. 100.

Their Lordships are of opinion that the plaintiff's contention was correct.

The sum of Rs. 45-7-3 was payable on the 28th March, 1919. It, however, was not an arrear until the 1st April; the last date, therefore, for payment of such arrear under the notification could not be the 28th March; but the last date for payment was the 7th June, 1919.

Under section 3 of the said Act the plaintiff's share in the estate was not liable to be sold for default of payment of the said arrear of revenue until the expiration of the last day for payment, viz., the 7th June, 1919.

Consequently the sale, which was held on the 6th June, 1919, was invalid, and must be set aside.

The learned Judges of the High Court held that the last date fixed for payment was the 28th March, 1919, and consequently that the Collector had jurisdiction to put up the property for sale on the 6th June, 1919.

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They based their decision on the construction of a document, Exhibit "B," which they said was the only evidence which the plaintiff adduced in support of her case. The said document was a notice issued by the Collector under section 7 of the said Act, which provides for notice to be given to ryots forbidding them to pay to the defaulting proprietor any rent which has fallen due after the day fixed for the last day of payment.

The said notice was as follows:—

"No. 3. Proclamation forbidding *raiyats* to pay rent to defaulters.
"Section VII, Act XI of 1859.
(Tirhut Division)
Darbhanga Collectorate.
"Ladugaon, pargana Bachhoor, Police Station Madhubani.

"Whereas a sum of Rs. 45-7-3 is due on account of arrears of revenue for the period ending the 21st Chait, 1326, corresponding to the 28th March, 1919, in respect of T No 554, having a *sadar jama* of Rs. 167-8-3, lying within the jurisdiction of this Court, for the realisation of the same, the 6th of June, 1919, is hereby fixed as the date of sale by auction. A notification is, therefore, issued in the name of Musammat Saroshwati Bahuria forbidding all the tenants as well as the co-sharers of the said *mahal* to pay to the defaulting proprietor their dues accruing after the last day (fixed) for payment of Government revenue on pain of not being allowed credit in their accounts with the purchaser in respect of the sum so paid

"This the 14th day of May, 1919
(Signed) "RAI KRISHNA BAHADUR, for Collector."

With respect to the learned Judges, their Lordships, as already intimated, are unable to agree with that decision.

In the first place, the said notice, Exhibit "B," was not the only evidence on which the plaintiff relied, and in the second place in their Lordships' opinion the said notice did not specify the 28th of March as the last date of payment.

The 28th March, 1919, was mentioned for the purpose of identifying the period in respect of which the revenue was due, viz., the period ending the 21st Chait, 1326, "corresponding to the 28th March, 1919." The last date fixed for payment of the Government revenue was not specified in the said notice.

For these reasons their Lordships are of opinion that the appeal should be allowed, the decree of the High Court, dated the 19th February, 1925, set aside, and the decree of the Subordinate Judge, dated the 25th June, 1921, restored.

The respondents must pay the costs of the plaintiff in the High Court and of this appeal, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Hardcastle Sanders & Co.*

Solicitor for respondents: *Ex parte.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

P.L.N.K.M. Nagappa Chettiar .. *Appellant** (*Applicant*)

v.

The Official Assignee of Madras, as the Assignee of the Estate of P. L. N. K. Subramaniam Chetty .. *Respondent* (*Respondent*).

Nagappa Chettiar *v.* Official Assignee of Madras.

Trusts Act (II of 1882), Ss. 51, 54 and 63—Investment of charity funds with co-trustee—Liberty to co-trustee to use the moneys—Adjudication of trustee—Doctrine of tracing—Limits of—Book adjustment

Where a trustee is authorised by the terms of the trust to invest the trust moneys in his own business and directed to pay interest thereon and the moneys are so utilised, the trust is not entitled to follow up the money into the assets of the trustee after he becomes an insolvent. All that the trust is entitled to in such a case is to rank as an ordinary creditor of the trustee. The consequence of the liberty so conferred upon the trustee is to convert the object of the trust from a particular sum of money into a personal obligation to pay on the part of the trustee. Subject to this modification, the trust still subsists. But the claim of the trust on the trustee rests on his personal obligation and can stand on no higher footing than that of the other ordinary creditors.

Official Assignee of Madras v *Krishnaswami Naidu*, (1909) I.L.R. 33 M 154, followed. *Official Assignee of Madras* v. *Krishnaji Bhat*, (1929) 59 M.L.J. 718, not followed.

Quaere. If the doctrine of tracing applies at all to cases of authorised conversion.

Tracing is a claim *in rem*—not *in personam* This distinction affords an index to the necessary limits of the doctrine of tracing. It may be in most cases sufficient for the *cestui que trust* to show that the trust moneys have found their way into the assets of the trustee and the trade assets of the trustee have, no doubt, been for purposes of the doctrine treated as a single entity, with an identity enduring throughout every phase and transformation and taking its latest form in whatever might ultimately remain of those assets at the time of the insolvency. But the very nature of the doctrine of tracing makes it a rebuttable presumption and it must be open to the competing claimants to show that the particular sums of money constituting the available assets are not, and in fact could not, possibly form part of the trust moneys.

Official Assignee of Madras v. *Minakshi Vidyasalai Sangam*, (1929) I.L.R. 52 M. 919: 57 M.L.J. 99; *Official Assignee of Madras* v. *Krishnaji Bhat*, (1929) 59 M.L.J. 718 and English case-law referred to

It is immaterial for this purpose if the trustee received the trust moneys by a settlement of accounts and not *in specie*. It only avoids the fiction of a payment and repayment but it is none the less equivalent to payment in cash.

In re *Hallett & Co.*, Ex parte *Blane*, (1894) 2 Q.B.D. 237, distinguished.

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*O.S. Appeal No. 104 of 1929. 21st August, 1930.

Nagappa Chettiar v. Official Assignee of Madras.

Bhashyam Aiyangar, J.—The money may also be divisible as property subject to the reputed ownership of the trustee.

On appeal from the judgment and order of the Honourable Mr. Justice Waller, dated 15th October, 1929, and passed in the exercise of the Insolvency Jurisdiction of this Court in Application No. 186 of 1929 in I.P. No. 405 of 1925—*In the matter of* P.L.N.K. Subramaniam Chetty, an insolvent. The judgment of Waller, J., is reported in 58 M.L.J. 36.

V. V. Srinivasa Aiyangar instructed by *V. Varadaraja Mudaliar* for appellant.

K. V. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for respondent.

The Court delivered the following

Curgenven, J.

JUDGMENTS. *Curgenven, J.*—This is an appeal from an order of Waller, J., passed in the insolvency of P.L.N.K. Subramaniam Chetty. The applicant, now appellant, was one P.L.N.K.M. Nagappa Chetty, son of a brother of the insolvent, and he claimed a preferential right to certain trust moneys said to be included in the funds in the Official Assignee's hands. At a partition in 1916 between the insolvent on the one hand, and the appellant and his brother Lakshmanan Chetty on the other, two sums each of Rs. 10,000 subscribed to as to ⅜ by the insolvent and as to ⅝ by the brothers, were set apart for two charities, with the parties to the partition as co-trustees. In respect of his own and his brothers' share in these trust funds the appellant, on 1st December, 1916, drew two hundies in favour of the insolvent on a firm at Madras known as the O.R.M.O.M.S.P. Firm (I will refer to it for short as the O.R.M. Firm). The insolvent kept the amounts of the hundies in deposit with this firm until 1920. It is common ground that he was at liberty to use the money in his business, undertaking to credit the trusts with interest at the *nadappu* rate; and, acting under this authorisation, he then carried out an adjustment with the O.R.M. Firm whereby the sums representing the appellant's contributions, amounting with interest to Rs. 15,732-15-9, were appropriated to discharge the outstanding liability of his own firm, which stood at the approximately equal figure of Rs. 15,700. His insolvency ensued in 1925, and it is in respect of two sums, one of Rs. 5,000 and the other of about Rs. 40,000, the sources of which I will mention later, and which form the only assets available, that the claim is made. It is to be noted that arguments have proceeded on the assumption that there was a perfected

trust, no challenge to that position having been raised before us by the respondent's learned advocate.

Upon these facts the learned Judge has decided against the Official Assignee in regard to the contention that, as soon as the insolvent used the money in his business, a relationship of creditor and debtor was created between the trustees and himself in respect of it; and in favour of the Official Assignee that the money, although remaining trust money, cannot be traced. His conclusions upon this latter point are (*a*) that utilisation of the trust money to pay his own debt to the bankers was merely a book adjustment, which put an end to the process of "following", (*b*) that, assuming that the process could be carried over that adjustment, the money in the Official Assignee's hands was demonstrably not part of the trust funds. The respondent endeavours to show that all these questions should be answered in his favour.

His contention on the first point, which, as I have said, has been decided against him, is that, so soon as the money was authorisedly invested in the business, it ceased to be subject to the trust, which became impressed upon a corresponding debt due from the insolvent to the trustees. We have to look very carefully at the subject-matter of the trust, and consider whether, as soon as the insolvent permissively obtained control of it for his own purposes, it did not undergo a transformation in character. As an illustration of such a transformation may be given the case where a trustee is authorised to invest trust money in ordinary joint-stock securities. Clearly the trust passes away from the money and attaches itself to the scrip representing a right to dividends or interest; and the trustee is no longer responsible for anything more than the value of the securities, whether, when the time comes to realise, it be greater or less than the original sum. Similarly, if in the present case the money had been invested not in the insolvent's firm but in a third party firm, it is conceded that, as between the trustees and that firm, the relationship would be merely one of debtor and creditor; in other words, the trust would be impressed not upon the money but upon the debt. It has been urged that the present is really a case of that description, because there are two trustees and the money was only invested with one of them; and it cannot therefore be said that the two parties to the transaction are indistinguishably one and the same. Apart from this point, Mr. V. V. Srinivasa Aiyangar's argument for the appellant is that where a trustee is permitted to make use of

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the trust funds, his obligation as trustee so far overrides the mere liability as debtor which he would otherwise be under that he must account for the money, as trust money, just as much as if the user had never been in contemplation and, in fact, was in breach of the trust. No English case has been cited in support of the proposition, but one or two cases of this Court have had to consider it. The earliest of these cases arose out of the Arbuthnot insolvency: *Official Assignee of Madras* v. *Krishnaswami Naidu*[1]. The trust deed which there came under consideration appointed the then members of the firm as trustees, and directed that the trust moneys should be placed in deposit, bearing 5 per cent. interest, with Arbuthnot & Co. Munro, J., came to the conclusion that the trustees and the banking firm could be regarded as two distinct and separate entities, when of course the liability of the Bank would be only that of a debtor. But he held further that, even regarding them as identical, there could be no difference in principle. "When, as trustees under the deed, they, as directed, invested the money in their own firm, their liability in their capacity as trustees appointed by the deed was reduced in the same manner as if they had not been members of the firm. When the money was invested with them as bankers, the same result must, there being no reason to the contrary, have followed as would have followed had the money been invested with another bank with which they had no connection."

Abdur Rahim, J., took the same view, observing that the effect of the directions to invest the money was that Arbuthnot & Co. were authorised to use the money as their own and to that extent they became debtors to the beneficiaries. The position of course would have been totally different if the investment had been in breach of the terms of the trust. This decision was dissented from by Kumaraswami Sastri, J., in *Krishnaji Bhat* v. *Sadasiva Tawker*[2], where a father had left Rs. 10,000 with Messrs. Tawker & Sons to be invested in the business as trust money for the benefit of his minor son. He held that the firm of Tawker & Sons were trustees in respect of that sum of money, not debtors, so that upon their insolvency the Official Assignee had to give priority to that claim over the claims of creditors. But the argument for which the Arbuthnot case was cited as authority was that since Tawker & Sons were allowed to use the money there was no trust; that the trust was *ipso facto*

1 (1909) I.L.R. 33 M 154. 2 (1926) 24 L.W. 869.

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destroyed. That, I agree, is an untenable position, and with all respect, I think that the reasoning which I have abstracted from the case shows that that was not the view of the learned Judges who decided it. It may be that the practical result is the same, but that is due, not to the destruction of the trust, but to the decision of the trustees to expose the trust funds to ordinary trading risks. I find it very hard to see how when trust money is handed over to any person, he be or he be not a trustee, to use in his business, and subject to the payment of interest, no relationship of creditor or debtor is set up. The circumstances that he may use the money as his own, and that he has to pay interest, seem to me to point clearly to the engrafting of a contract upon the trust, whereby title to the money is transferred. and the trust no longer can look to that particular sum of money, as its *res* or subject-matter, but to a promise to pay an equal sum. If he holds it purely as trust money he is debarred by section 51 of the Trusts Act (II of 1882) from dealing with it for his own profit, and the *veto* so imposed seems to be absolute, and not subject to modification by the terms of the trust. It will be seen that whereas sections 46 to 48 and 50 of the Act all contain some such phrase as "Except where the instrument of trust otherwise provides," there is no qualification of this kind to section 51. The true principle seems to be that the terms of the trust permit the conversion of the money into something other than money,—here the obligation to repay the debt incurred—so that when the money comes to be used it ceases to be trust money. The same case of Tawker & Sons came on appeal before Reilly and Cornish, JJ., in *Official Assignee of Madras* v. *Krishnaji Bhat*[3] and Reilly, J., disposed of this argument in the same manner, holding, no doubt quite rightly, that a relationship of debtor and creditor had not "superseded, overwhelmed and obliterated" Tawker & Sons' trusteeship. Both the trusteeship and the relationship of debtor and creditor were there, though they may have been combined in the same individuals; and we have been referred to no authority for the proposition that, when so combined, the legal effect is different from what it would be when the individuals are separate.

To the best of my judgment, therefore, this contention avails to dispose of the appellant's case; but I confess that, although it persuades me, it is with some relief that I find another ground, not equally open to the charge of fine-drawn reasoning, or to the same extent the subject of differing judg-

3. (1929) 59 M.L.J. 718.

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ments, upon which to arrive at the same conclusion. It is admitted that, if the trust money is to be recovered in full from the assets in the Official Assignee's hands, it must be by application of the doctrine of "tracing" or "following". I am in some doubt whether that doctrine applies at all to cases of authorised conversion, and certainly the English cases cited deal, I think exclusively, with disposal by the trustee in violation of the terms of the trust. But it has not been suggested that, if it so be that you can follow money used as it was used in this case, any greater latitude of principle or of inference is permissible than if the conversion involved a breach of trust. The arguments have been largely based upon cases in which, as I have said, the conversion has been of this latter kind, and I think that the appellant's claim must stand or fall according to the legal principles to be derived from them.

The earlier English cases bear witness to the evolution of the equitable doctrine of tracing, as applied to trust funds mixed with the trustee's own funds in his private banking account. It appears that in Lord Hardwicke's time (1746 to 1755 A.D.) trust money could not be followed unless it was definitely earmarked. Then in 1850 it was held in *Pennell* v. *Deffell*[4] that trust money may be followed into a private account in which it is mixed with personal funds, though the rule in *Clayton's* case[5] that drawings must be allocated to deposits in order of time, was held to apply. There was clear observance in this case of the principle that the presence of a definite sum of trust money in the account must be ascertained before it can be claimed. In the matter of the applicability of the rule in *Clayton's* case[5] as between trust and private funds, In re *Hallett's Estate, Knatchbull* v. *Hallett*[6] marks an advance, that rule being held only to apply as between competing *cestui que trustent*, as between trust funds and private funds, a trustee must be presumed to have drawn upon the latter until they are exhausted. In this case Jessel, M.R., has reviewed at length the progress of the equitable theory of tracing, concluding with a statement of the law as it then stood and, for all that we have been shown, now stands. The original subject-matter of the trust may be traced into what other form different from the original it may have passed; the right only ceases when the means of ascertainment fail. If it is money, and has become mixed with other

4 (1850) 43 E R 551. 5. (1816) 1 Merivale 572
6 (1880) 13 Ch D 696

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money, equity will follow it and create a charge upon the whole for the satisfaction of the claim. The principles of In re *Hallett's Estate*[6] as to following were applied by Lord Haldane, L.C., in circumstances of a different kind in *Sinclair* v. *Brougham*[7]. Certain persons had deposited money in a Building Society not authorised to receive such deposits, so that the title remained vested in the depositors. That being so, they would not succeed unless they were able to trace their money into the hands of the society or its agents as actually existing assets "Their claim cannot be *in personam* and must be *in rem,* a claim to follow and recover property with which, in equity at all events, they had never really parted." If this distinction between a right *in personam* and a right *in rem* is kept clearly in view, it affords, I think, index to the necessary limits of the doctrine of tracing. There is only one other English case which, I think, requires notice. It was a case of the mixing of trust funds with private funds in a private banking account, which was afterwards drawn upon by the trustee down to a certain minimum figure. Although it was subsequently replenished with private funds, Sargant, J., in *James Roscoe (Bolton), Limited* v. *Winder*[8] held that the trust could not avail itself of this circumstance, but was confined to the minimum figure as all that was left of the trust money. This case again marks the limits which have been set to the theory of tracing in England. Once the competing claimants can show that the money, wholly or in part, is other than the trust money the claim fails.

Before considering two cases which have been decided by this Court, reference may be made to an English decision upon a special feature which is said to be present here. It has been already noted that on 10th February, 1920, the insolvent adjusted virtually the whole amount of the trust funds in the hands of the O.R.M. Firm against his own liability to that firm, and there can be no doubt that this was a book adjustment, no money passing. Following the decision In re *Hallett & Co*, Ex parte *Blane*[9] the learned Trial Judge has held that "a settlement of account cannot be followed", so that the quest fails at this early stage and for this reason. I think that, if the facts of Ex parte *Blane*[9] are closely considered, it will be seen that Lord Esher's dictum that "a settlement of account

6 (1880) 13 Ch D 696
7 (1914) A.C. 398.
8. (1915) 1 Ch. 62
9. (1894) 2 Q.B.D. 237.

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cannot be followed" must be read in the light of the special circumstances, and that the case is really only an exemplification of the necessity—clearly stated by Lords Justices Lopes and Davey—of being able to follow certain specific property. It was clear in that case that the trust money never came into the hands of the defaulters' bankers, but reached another destination by means of the settlement of account referred to.

In the present case it is, I think, quite immaterial whether we regard what happened as a mere settlement of account between the insolvent and the O.R.M. Firm, or whether we take it that that firm paid the Rs. 15,000 odd trust money in cash, and the insolvent thereupon paid it back in discharge of his overdraft. There is no doubt that, on either supposition, he used the money for the purposes of his firm, as he was free to do, and that it was disposed of in this particular way. The appellant contends that that is really all he need show—that it went into the assets—to give him a first claim upon any subsisting assets for the whole amount. For this purpose we must regard the trade assets, he says, as a single entity, with an identity enduring throughout every phase and transformation, and taking its latest form in the sums now in the Official Assignee's hands. Now an assumption of this kind is to be found in two cases of this Court, *Official Assignee, Madras* v. *Minakshi Vidyasalai Sangam*[10], decided by Coutts Trotter, C.J., and Anantakrishna Aiyar, J., and the already cited case, *The Official Assignee of Madras* v. *Krishnaji Bhat*[3]. I think, it is clear, from the English cases cited before us and which I have made some attempt to abstract, that this would take the theory of tracing a good deal further than any actual English decision would warrant, and in fact in both instances reliance was placed, not upon an actual decision, but upon an illustration employed by Turner, L.J., in *Pennell* v. *Deffell*[4], the case of an executor of a deceased partner leaving the latter's capital with the surviving partners to trade with, and the persisting identity of the partnership share through all its fluctuations. Whether or not this would afford a valid parallel to such a process of tracing as we have now to deal with is not an easy question to answer, and I do not think that I need try to answer it, because it appears to me possible to accept the general proposition while attaching to it certain seemingly necessary qualifications. The general argu-

3 (1929) 59 M.L.J. 718

4. (1850) 43 E.R. 551.

10 (1929) I.L R. 52 M. 919. 57 M.L.J. 99

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ment is most fully set out in the judgment of Reilly, J., and he adopts as his premises that

"if you are to trace and follow trust property within the meaning of section 63 of the Trusts Act, you must be sure that there is a continuing identity from one transformation to another, there must be a traceable continuity. You must be able to assure yourself with reasonable certainty that the trust property has been transformed by successive transactions into the substitute which the beneficiary claims or into something embracing it on which he is entitled to a charge"

That is, if I may say so with respect, an unexceptionable statement of the law. It may, too, be not stretching it too far to adopt, as a general presumption, the position, whether you can prove it by evidence or not, that trust money put into a business is traceable to the eventual assets. This is, I think, all that these two decisions lay down. But such a presumption, if the principles of tracing are not to be given the go-by altogether, must be rebuttable, and it must be open to persons interested in the distribution of the assets to show that the trust money could not possibly form part of them. This is recognised by Cornish, J., in *The Official Assignee of Madras* v. *Krishnaji Bhat*[3], where he says that "no evidence has been called to show that the stock which became vested in the Official Assignee was in no wise, or could not be, the produce of the original investment of the Rs. 10,000." Now in the present case there are two sums in the Official Assignee's hands—one of Rs. 5,000 not at all derived from the business in which the trust money was invested, the other of some Rs. 40,000 being income-tax levied on 27th July, 1918, while the trust money was still on deposit, and refunded after that money had been disposed of, and, in fact, after the adjudication. By no fiction or assumption is it possible to say that any part of the trust money enters into the composition of those sums. They are shown to be wholly otherwise composed. That being so, no doctrine of tracing, no claim *in rem* can avail to get the trust money out of them.

In the result therefore the appeal fails and is dismissed with costs.

Bhashyam Aiyangar, J.

Bhashyam Aiyangar, J.—I agree with the judgment just pronounced by my learned brother. The facts are fully stated therein and need not be repeated. I shall only add a few words on the questions of law which were argued before us.

Three chief points were raised before the learned Trial Judge. The first was that, as the charities had been constituted on the footing that their funds could be invested and used by the insol-

3. (1929) 59 M.L.J. 718 at 730.

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vent-trustee in his own business, in consideration of his paying *nadappu* interest, he became, when he accordingly invested and used them in his own business, only a debtor to the trust with reference to those amounts and consequently the trust can have no charge on, or preferential right in, his general assets in insolvency, but must only rank along with the ordinary creditors. The second proceeded on the assumption that what took place between the O.R.M. Firm and the insolvent on the 8th February, 1920, was a mere book adjustment and that there was no passing of money into the hands of the insolvent and it was to the effect that, as no money actually passed, there was nothing to follow. The last point was that the two specific sums of money now in the hands of the Official Assignee have no connection whatsoever with the trust moneys and therefore no preferential right can, in any event, be claimed with reference to them on behalf of the trust. The learned Trial Judge has answered the first point against the Official Assignee but the other two points in his favour.

Now, taking the first point, there is direct authority on it in favour of the Official Assignee in the case of *The Official Assignee of Madras* v. *Krishnaswami Naidu*[1] decided by Munro and Abdur Rahim, JJ., the facts of which are practically indistinguishable from those of the present. But the learned Trial Judge has decided the point against the Official Assignee on the strength of a later and a recent judgment of Kumaraswami Sastri, J., in *Krishnaji Bhat* v. *Sadasiva Tawker*[2] which has since been confirmed on appeal by Reilly and Cornish, JJ., in *The Official Assignee of Madras* v. *Krishnaji Bhat*[3]. The earlier case is referred to in the judgment of Kumaraswami Sastri, J., who distinguished the judgment of Munro, J., and differed from that of Abdur Rahim, J., therein, but not in the judgment on appeal. The later case was one of private trust but otherwise similar to the present. There the plaintiff's father had entrusted a sum of Rs. 10,000 with Messrs. Tawker & Sons for the benefit of the plaintiff and authorised them to invest the said sum for interest at 9 per cent. in their own business or in any other firm as they may deem fit. The plaintiff was a minor. The document which evidenced the trust provided that the firm should pay the interest from time to time and the principal to the plaintiff on his attaining the age of 21

1. (1909) I.L.R. 33 M. 154 2 (1926) 24 L.W. 869
3 (1929) 59 M.L.J. 718.

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years. The firm invested the amount in their own business and some time later became insolvent. The question then arose whether the *cestui que trust*, the plaintiff, was entitled to a preferential right in the general assets of the firm to the extent of the said sum and it was decided in the affirmative in the Trial Court as well as on appeal. The point was raised and considered whether the plaintiff can claim the right of tracing in the face of the authority which had been given to the trustees by the settlor to invest the money in their own business and it was answered in the affirmative.

This answer, if correct, would apply to the present case also and the decision of the learned Trial Judge on the point under consideration must be upheld. But, with the greatest respect, I have found myself unable to agree with it. Now, let us consider in what cases the right to follow trust property can arise to the *cestui que trust*. Here, it is essential to keep in mind the true nature of the right. It is strictly a right *in rem*, that is, to the thing itself. No doubt equity has given a somewhat wider scope to this conception when dealing with money which gets mixed up with other money but it is quite a natural and proper extension and in no way opposed to the basic principle of the conception. Thus, if a sum of Rs. 100 belonging to a trust is mixed up by the trustee with another sum of Rs. 100 of his own, either in his cash chest or in his account with a banker, it may no doubt be impossible to separate the identical coins which belonged to the trust, but it does not make the least difference which sum of Rs. 100 is taken back for the trust out of the mixed fund, so long as the amount is identical. This, indeed, is the principle recognised and laid down by Courts of Equity in the series of cases beginning with *Pennell* v. *Deffell*[4]. Now, the right to follow the trust property can obviously arise only where the trustee deals with it inconsistently with the trust, in other words, when he commits a breach of trust. So long as the trustee keeps the trust property apart or disposes of it by sale or otherwise as directed or authorised by the terms of the trust, it is clear that there can be no question of following the trust property. When it is disposed of in pursuance of the trust, title validly passes and the *estui que trust* has no further right in respect of it. Whatever the trustee obtains in lieu of the trust property in such a case belongs to the trust and the *cestui que trust, ipso facto* becomes entitled to it, and

4. (1850) 43 E.R. 551

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there is no scope at all here for any following. When a trustee wrongfully sells the trust property, the *cestui que trust* cannot merely disregard the sale and follow the property in the hands of the alienee (except where the alienee is a *bona fide* purchaser for value) but he can also "in a sense" adopt the sale and seize the proceeds, if possible, in the hands of the trustee. The rights of the *cestui que trust* are thus only either (1) to follow the trust property where the trustee has dealt with it in breach of the trust, or (2) to have the proceeds brought into the trust by way of substitution, where there has been a disposition in accordance with the terms of the trust or in election by the *cestui que trust* to abide by the disposition. This second right is spoken of by Jessel, M.R., in In re *Hallett's Estate, Knatchbull* v. *Hallett*[6] "as a right to follow the proceeds" (*see* p. 709). It will avoid confusion here to confine the application of the word "follow" to trust property only.

Coming now to the present caes, the trustee was, as observed already, authorised to invest the trust money in his own business in consideration of his paying *nadappu* interest. Therefore, when he collected the trust moneys from the O.R.M. Firm and put them in his own business, he was acting within his rights and there was no breach of trust. The moneys having thus left the trust and rightfully gone into the trustee's own business, it is difficult to see how those moneys can be followed, that is, made the object of pursuit. Suppose a trustee lends out trust moneys to a third person in pursuance of a direction to that effect; can it be contended that the *cestui que trust* has a right *in rem* to the moneys so lent out, such as would enable him to follow them in the debtor's hands? The contractual obligation of the debtor having taken the place of the trust moneys and thus become the *res*, it is clear that the moneys which became the debtor's property could not be followed. Why then should it make a difference if the loan was to the trustee's own business instead of to a third person? When the settlor authorises the trustee to invest the trust money in his own business, does he contemplate anything more than that the liability of the trustee in his personal capacity should form the object-matter of the trust? Suppose a person had lent money to another for his business; is there anything to prevent the former from settling that debt on trust and constituting the debtor himself a trustee? In such a case, can the *cestui que trust* claim a right *in rem* over the money which had been lent? If not, it should, I think, follow that no such

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6. (1880) 13 Ch. D. 696.

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right is available even where the trustee invests the trust money in his own business for interest, under an authority provided by the settlor.

In his judgment in *Krishnaji Bhat* v. *Sadasiva Tawker* [2] Kumaraswami Sastri, J., observes.

"If the author of the trust deed agrees that the trustee can use the money for his own benefit, there seems to be no reason for saying that the trust goes and that it cannot be trust property in any sense of the term because of this liberty given to the trustee."

The contention, however, is not that "the trust goes" in such a case but only that when the trustee is authorised to use and accordingly uses the trust money in his own business for interest the object-matter of the trust is no longer the money but the personal obligation of the trustee which alone fetches the interest. Subject only to this modification, the trust will subsist and its administration will have to be carried on by the trustee according to law and the other terms of the trust. If thus the personal obligation of the trustee becomes the object-matter of the trust in cases in which he is authorised to use the trust money for his own benefit in consideration of his paying interest, there can be no difference between the claim of the trust as creditor and the claims of the other creditors over the personal assets of the trustee. The trust can have no preferential right or charge but only rank along with the other ordinary creditors.

In this connection, reference may, I think, be usefully made to section 52, clause (2) (*c*) of the Presidency Towns Insolvency Act (III of 1909). Under that clause goods "in the possession, order or disposition of the insolvent in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof" are declared to be the property of the insolvent, divisible among his creditors. The case of trust money which the trustee is authorised to use for his own benefit must, it seems to me, be *a fortiori* so divisible.

I think for these reasons that the answer to the first point must be in favour of the Official Assignee.

As regards the second point, the learned Trial Judge has held that what took place between the O.R.M. Firm and the insolvent on the 8th February, 1920, was a mere book adjustment and there was no passing of trust money between them and

2. (1926) 24 L.W. 869.

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consequently there was nothing to follow. I regret I am unable to take the view that there was no passing of trust money from the O.R.M. Firm to the insolvent. As the accounts stand, it does not appear possible to assert affirmatively that the entries of the payment of Rs. 8,740-8-9 of the water pandal charity and Rs. 6,992-7-0 of the Kalaiyar Koil charity by the O.R.M. Firm to the insolvent as trustee or of the sum of Rs. 15,700 by the insolvent to the O.R.M. Firm to the credit of his personal account represent transactions in which no cash passed. On the other hand, the fact that the total of the charity funds is not identical with the amount of the personal credit indicates that cash should have passed. Let us, however, assume that no hard cash actually passed and there was only an adjustment. But how does it matter? The adjustment is truly and strictly only a payment and a repayment, without the formality, unnecessary in such a case, of passing cash for either transaction. It will have the same effect on the cash balance of either party as if cash had passed for each entry. Therefore, there should be the same legal consequence or right with reference to each item of the adjustment, as in the case of an actual payment. It cannot be, and is not, denied in this case that, if the O.R.M. Firm had paid the charity funds to the insolvent in cash, they could be followed in the hands of the latter. If so, there appears to be no reason to deny such a right merely because such payment was dispensed with in whole or in part as the insolvent was making another payment in his personal capacity to the same firm on the same day. To say that there was no passing of trust money from the O R.M. Firm to the insolvent-trustee would imply that it is still with the former which is admittedly not the case.

The decision relied on by the Official Assignee in support of his contention on this point, namely, In re *Hallett & Co.*, Ex parte *Blane*[9] does not in my opinion apply to the facts of this case. I do not think it is an authority for the proposition that a book adjustment has different legal consequences from what would have followed had actual payment been made for each of the entries going to make up the adjustment. On the other hand, the decision therein seems to have proceeded on the ground that the book adjustment in that case did not make out that the trust money had passed into the fund into which it was sought to be traced. This appears from the observation of Davey, L.J., that even if Hallett & Co., the fiduciaries, had

9. (1894) 2 Q.B.D. 237

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received the trust money, namely, £1,600 in cash, there would have been no right to follow it as it was not lent to Cocks, Biddulph & Co into whose possession it was sought to be traced but only "applied by Hallett & Co. in paying on behalf of other customers £1,600 to Hewitt & Co. for which they got a credit from their other customers" Lord Esher, M.R., also says the same thing in the following passage in his judgment:

> "Had there been anything in existence representing that which the bankers were authorised to collect, Colonel Blanc might have followed it; but he cannot show that, he can only show a transaction between Hallett & Co. and other persons "

As in the present case, the trust moneys in question cannot but be held to have passed into the hands of the insolvent-trustee by what took place on the 8th February 1920, there is no question of their being untraceable. The insolvent-trustee having at once invested them in his own business as authorised by the terms of the trust and thereby rightfully converted them into a debt due by himself, they became free of the trust and incapable of being followed. That, however, is a different point and it has been dealt with already.

We are now left with the third point. It does not arise in the view which has been taken on the first point. I may, however, state that, even if I am wrong on that point, the contention of the Official Assignee must be upheld and the application must fail on the point under consideration as held by the learned Trial Judge. Now, it cannot be doubted that, for following trust money into another fund, it is absolutely necessary to make out that the former came into the latter or into something of which the latter can be said to be a substitution, either immediate or mediate. This principle is recognised in all the cases relating to the question of following trust moneys. (See *Pennell* v. *Deffell*[4], *Frith* v. *Cartland*[11], In re *Hallett's Estate, Knatchbull* v. *Hallett*[6], *Sinclair* v. *Brougham*[7] and *James Roscoe (Bolton), Ltd.* v *Winder*[8].) In the present case, out of the two sums of money in the hands of the Official Assignee, one, namely, the sum of Rs. 5,000 was admittedly not derived from the business in which the trust moneys were invested; and the other, that is, the sum of Rs. 40,000 is a rebate from an amount paid for income-tax long before the trust moneys came into the hands of the insolvent-trustee from the firm of O.R.M. and no

4. (1850) 43 E R. 551.
6 (1880) 13 Ch.D. 696
7. (1914) A.C. 398
8 (1915) 1 Ch 62.
11. (1865) 71 E.R. 525.

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attempt was made to show any manner of connection between that sum and the trust moneys. It is, therefore, perfectly clear that the trust cannot claim any charge or preferential right over the specific funds in question.

On the conclusions arrived at on the first and third points, the decision of the learned Trial Judge must be upheld and the appeal dismissed with costs.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Devatha Sriramamurty .. *Petitioner* (Petitioner in M.P. No. 1 of 1930 on the file of the Court of the Stationary Sub-Magistrate of Rajahmundry).*

In re Sriramamurty.

Criminal Procedure Code (V of 1898), Ss 144 and 439—Order of Magistrate under S 144—Revisional jurisdiction of High Court—Evidence not disclosing urgency of apprehended danger—Duty of High Court to interfere—Order prohibiting the public from hoisting flags in private houses—Legality—Proceeding under S. 144—Information forming basis of action by Magistrate—Right of accused to know.

Proceedings under S. 144, Criminal Procedure Code, are judicial and are subject to revision by the High Court. Where the elements essential to action under the section are shown to exist upon materials legally before the Court, the High Court will, in exercising its powers of revision, respect the opinion of the local authorities both as to the gravity of the danger and as to the steps necessary for maintenance of peace. But where those elements do not, upon a fair view of the evidence, exist, the High Court will not uphold the order of the local Magistrate because he has chosen to say that they do exist. If it is the case that the grounds for action as stated in the order are either unfounded in fact or insufficient in law or if it is shown that the order against the public as framed violates the conditions laid down in S. 144 it is the duty of the High Court to interfere Thus where the evidence before the Magistrate does not show the existence of any urgency of apprehended danger the order under S. 144 should be set aside.

Observations of Sir Lawrence Jenkins, C.J., in *Emperor* v. *Bankatram Lachiram,* (1904) I.L.R. 28 Bom. 533 at 566, relied on

An order under S. 144 cannot be passed against the public without the limitation as to place, namely, that it must be one, whether publicly or privately owned, which at the time when the prohibition operates, the public frequent or visit as such. Thus the public cannot be prohibited from putting up flags in private houses It is a misuse of language to call house owners who use their houses members of the public for the purpose of S. 144.

Abdul Gafur v. *Emperor,* (1914) 27 I.C. 670, considered.

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*Cr. R.C. No. 437 of 1930.
Cr. R.P. No. 404 of 1930.

11th August, 1930.

In re Sriramamurty.

A person against whom an order under S. 144 is passed has a right to know what the information was on which the Magistrate acted in order to show that it was unfounded or insufficient.

Order under S. 144 prohibiting the public from hoisting tri-coloured or national flags on any building in Rajahmundry set aside.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Rajahmundry, dated 4th July, 1930, in Miscellaneous Petition No. 1 of 1930.

T. R. Ramachandra Aiyar, G. Lakshmanna, P. V. Vallabhacharyulu, T. V. Srinivasachari and *G. Chandrasekhara Sastri* for petitioner.

The Advocate-General (*A. Krishnaswami Aiyar*) and *K. N. Ganapathi* for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise an *ex parte* order, dated 14th June, 1930, made under section 144, Criminal Procedure Code, by the Stationary Sub-Magistrate, Rajahmundry, which on application dated 16th June by the petitioner that Magistrate by his order dated 14th July declined to rescind. The order of 14th June is as follows:—

"*Order under Section 144, Criminal Procedure Code.*

"Whereas from information given by the Police it has been made to appear to me that in Rajahmundry the hoisting of tri-coloured flags called national flags on the residential and other buildings is giving room to certain rowdies and men of bad character to think that they can safely molest them under a wrong belief that no notice would be taken by those responsible for law and order and that for the preservation of peace and tranquillity the removal of such flags is necessary and emergent, I, P Mallikarjuna Row, B A, Second Class Magistrate, Rajahmundry, hereby prohibit under section 144, Criminal Procedure Code, the placing or hoisting of such flags or continuing to keep them on any building in general and on the buildings of Messrs (1) Devutha Sriramamurty (2) Dr Veerabhadraswami, (3) Burra Suryaprakasa Row, (4) Uppala Satyama, and (5) Polayya Naidu of Rajahmundry in particular for a period of two months from to-day, 14th June, 1930, and strictly warn and enjoin the public of Rajahmundry including individual members of Congress organizations and Satyagraha volunteers residing in Rajahmundry not to take part in any such demonstrations of keeping such flags on their buildings during the said period

"The order is issued under clause (2) of section 144, Criminal Procedure Code, as the circumstances do not admit of the service of notices on the persons concerned in due time."

The circumstances in which this order came to be passed were these. On 10th June the District Magistrate of East Godavari made two orders under section 144, one prohibiting the public including certain named persons and other officers and members of Congress organizations from holding meetings and processions in any public place or thoroughfare or other

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place frequented by the public within the town of Rajahmundry and within a radius of seven miles from Rajahmundry, the other prohibiting one Mallikarjuna Row and other Congress volunteers residing in particular premises from residing there. These orders were passed in view of the campaign of Civil Disobedience, which had broken out in Rajahmundry and they broke up the base of operations of the Congress volunteers and stopped demonstrations in public places in sympathy with them. They did not and could not interfere with anything done in private houses and buildings, for example, the flying of the national flag in them. The authorities had no power to interfere with such flags but were naturally dissatisfied with their being flaunted from house-tops after they were driven away from the streets. On the 13th June the Police went about and succeeded in getting a great many of these flags removed. As no Police Officer gave evidence in these proceedings we have no means of knowing their own version of how this was done. But the third witness for the counter-petitioners who was examined in support of the Police and who appears to be a respectable man having been an Honorary Magistrate speaks of the Police pulling down the flags and of himself closing his shop door when the Police were pursuing the people assembled in crowds. However that may be, on the morning of the 14th June, the Police went to the house of the petitioner, a pleader, and asked him to remove the flag from his house. He refused and the Police not having legal authority to enforce their demand withdrew for the time. Later in the day on this becoming known, many of those whose flags had been removed the previous day put them up again and therefore most of the work of the previous day was undone. In these circumstances the Deputy Superintendent of Police applied to the Magistrate for an order under section 144 prohibiting these flags stating as the ground for action under that section that they gave room for certain rowdies and men of bad character to think that they can safely molest or attack the places where the flags were flying under a wrong belief that no notice would be taken by those responsible for law and order and that in the interests of peace and tranquillity it was necessary to remove the flags. Thereupon the Magistrate made an *ex parte* order as above.

The order is addressed to five named persons including petitioner and the Police. On 16th June the petitioner applied to the Magistrate to cancel his order stating that the ground for action as stated in the order was both untrue in fact and insufficient in law to justify

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action; that the flag in the petitioner's house had been there several months and there never was any attack nor apprehension of any attacks by rowdies on his or any other house by reason of the flag; in short, that there was no urgent or in fact any apprehension of danger to the public peace such as to justify the order and that so far as the order on the public was concerned, it was *invalid* as it purported to prohibit them from hoisting flags on private houses where they do not frequent.

The Magistrate held an enquiry for the purpose of section 144 (4) in which eleven witnesses were examined on the petitioner's side and three on that of the Police. No Police Officer went into the witness-box. Before going further I ought to say that the Sub-Magistrate was wrong in having refused to the petitioner a copy of the information given to him on 14th June and on which his order of that date was based. Proceedings under this section are judicial (*Muthuswami Servaigaran* v. *Thangammal Ayiyar*[1]) and are subject to revision by this Court. The petitioner had a right to know what the information was on which the Magistrate acted in order to show that it was unfounded or insufficient. The petitioner's advocate was therefore allowed access to the original by me. On a consideration of the evidence the Magistrate declined to rescind his order. Hence this petition.

The duty of this Court is to satisfy itself as to the correctness, legality or propriety of the order of the Lower Court and to pass such orders as may be necessary. The powers of this Court in revision as described in section 439 are general and their generality cannot be cut down by any decision. On this point I would respectfully adopt the words of Sir Lawrence Jenkins, C.J., in *Emperor* v. *Bankatram Lachiram*[2] where that learned Judge quoting another eminent English Judge said:

> "This controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallised as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case"

1. (1929) I.L.R. 53 M. 320: 58 M.L.J. 148.
2. (1904) I.L.R. 28 B. 533 at 566

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I have ventured to refer to what may be considered common knowledge in this Court, because the learned Advocate-General at more than one point of his address stressed the point that in considering the propriety of orders under section 144 this Court will not substitute its judgment on the facts for that of the Lower Court which alone is responsible for the peace of the locality. The element of validity in this contention is that where the elements essential to action under the section are shown to exist upon materials legally before the Court, this Court will, in exercising its powers, respect the opinion of the local authorities both as to the gravity of the danger and as to the steps necessary for maintenance of peace. But this does not mean that where those essential elements do not, upon a fair view of the evidence, exist, this Court will blindly uphold the order of the local Magistrate because he has chosen to say that they do exist. That would be for this Court to relinquish its function into the hands of Lower Courts, a course which will be as dangerous to the public peace. Instances of such interference abound in the reports. If it is the case that the grounds for action as stated in the order are either unfounded in fact or insufficient in law or if it is shown that the order against the public as framed violates the conditions laid down by section 144 it is the duty of this Court to interfere.

To take the second point first, the order consists of two parts, one addressed to five individuals, the other to the public generally. So far as it is addressed to the public generally, it is clearly a violation of the express terms of section 144 (3) which states that an order under this section may be addressed to the public generally when frequenting or visiting a particular place. No order can be passed against the public without that limitation as to place, namely, that it must be one, whether publicly or privately owned, which at the time when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meeting held in private premises. But the place must be one which is open to the public as such. And this involves that the public cannot be prohibited from putting up flags in private houses, first because those who put up the flags are owners or occupants of such houses and second because the public as such neither frequent nor visit private houses. It is a misuse of language to call house owners who use their houses members of the public for the purpose of this section and I have not been shown any instance of such a use of the section. The learned

Advocate-General attempted to argue that an order to the public may be valid without the limitation above mentioned. I consider that the words of the Statute are clearly against this contention. The only authority to which he referred was a decision *Abdul Gafur* v. *Emperor*[3] which is not only no authority in this Court but did not really decide the point as contended. I must hold that the order so far as it is directed to the public was misconceived and must be set aside.

So far as the order is directed to the petitioner himself, the objection of substance is that on the materials before the Magistrate there was no evidence of urgent or indeed any apprehension of danger of breach of the peace or disturbance of the public tranquillity to justify the order. I have referred to the circumstances that, judging from the order of events, the application for the order appears to have been prompted by the fact that owing to the petitioner's refusal to remove his flag even those who had been induced to remove it on the 13th re-instated the flags on the 14th June and the authorities had no power to enforce their wish to see the flags removed. But the ground stated to the Magistrate and stated by him in the order was that hoisting of flags gave room to rowdies and men of bad character to think that they may safely molest the buildings carrying them under a wrong belief that no notice would be taken by those responsible for law and order. A great deal of argument was devoted on the petitioner's side to the proposition that if there were really such a situation at Rajahmundry it was the duty of the Police and Magistracy to protect the law-abiding persons who had flags and to restrain the rowdies and not as the Magistrate has done to restrain law-abiding persons and give encouragement to rowdies and men of bad character. On the other side it was argued by the learned Advocate-General that under this section it was quite legal to restrain legal acts in the interests of public safety and therefore that if the authorities had not enough resources to restrain the rowdies and men of bad character, it was proper to prohibit the provocative flags. I do not think profitable to enter into the abstract discussion to what extent and in what circumstances perfectly legal and innocent acts may have to be restrained in the interests of the public safety. For I have come to the definite conclusion that there is nothing in the evidence to support the allegation of a threatened attack on flag-bearing buildings by rowdies and men of bad character.

3. (1914) 27 I.C. 670.

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I have examined the evidence with care. If there were any such apprehension as alleged it is strange that no officer of the Police who knew of it cared to go into the witness-box The petitioner, P.W. 1, stated that the flag had been in his house from 1921 and that rowdies and bad characters had never done any mischief. He spoke to the demand of the Police on the morning of 14th that the flag should be removed and his refusal and to its subsequent removal after the order was passed. P. W. 2, one of the persons prohibited by the order from hoisting a flag, is a doctor with European qualifications and a man who had served in the Great War as temporary Captain in the I.M.S. He swore that he never had a flag either in his house or in his dispensary and therefore of course had none to remove. P.W. 3, the brother of one of the persons, prohibited by the order, says that at 6 P.M. on 13th June eight members of the Reserve Police came with lathies and bamboo sticks to their house where there was a flag for 5 or 6 months and threatened him and climbed to the flag and broke it and removed it and that no one else had molested them for having the flag. P.Ws. 4 to 9 give similar evidence about the removal of the flag from their houses by the Police on 13th June and about there having been never any molestations from rowdies or bad characters on account of the flags. P. W. 10 is a stamp-vendor who speaks to having received lathi blows when standing on a pial during the flag-removing operations by the Police on 13th June and to his being under treatment for his injuries. The evidence on the side of the counter-petitioner is of three witnesses. C.P.W. 1 gives rather confused evidence about what happened before and after the order under section 144. From his evidence it is clear that he heard the proclamation of this order on 14th June by beat of tom-tom. But he says that after it no one removed the flags though in another place he said that in the evening after the tom-tom he did not see any flags. About the theory of molestation by rowdies and men of bad character, his attempt was to show that these were hungry coolies who were incensed at the frequent hartals with closing of shops whenever any Congressman was arrested and who therefore might attack the buildings with flags which they would connect with the hartals. But the evidence of this and the other two witnesses for the counter-petitioner broke down hopelessly on this point. Although in one place he said he heard coolies and others say that shops are always closed on account of these flags and that they would remove them if the Police did not remove them, he admitted he did not know any

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The Court made the following

ORDER.—This is a petition to revise an *ex parte* order under section 144 of the Code of Criminal Procedure made by the District Magistrate of Guntur on the 20th June, 1930, prohibiting the public from wearing Gandhi caps in any place frequented by the public within the limits of the Guntur Municipality and a radius of five miles therefrom for a period of two months and an order passed by the same Magistrate on 10th July refusing to rescind the first order on a petition by the present petitioner dated the 2nd of July, 1930.

The circumstances in which the *ex parte* order came to be passed are as follows:—On the 14th of June the District Magistrate passed two orders under section 144, in view of the Civil Disobedience Movement, one prohibiting processions of more than four persons and public meetings in Guntur and the other directing the volunteers to leave the Sibiram. On the 15th, as the volunteers did not leave the Sibiram, it was raided and captured and the volunteers dispersed During the next two days the Police were patrolling the streets to see that the orders were obeyed and that the volunteers who were mostly not natives of Guntur left the place. Complaints arose that the Police on those days tried to prevent people wearing Khaddar dress and Gandhi caps on the roads and were molesting those that did so. On the 18th ten inhabitants of Guntur including the President of the District Board, the present and former Chairman of the Municipality and other respectable persons presented to the District Magistrate a written representation complaining of molestation by the Police of people wearing Gandhi caps and Khaddar and asking for protection. At their request they were granted an interview by the District Magistrate on the 18th. As the record in this case did not contain an authoritative account of what transpired at this interview I called for a report from the District Magistrate. He has submitted a confidential communication. One only of the deputationists was able to vouch for the accuracy of the complaints from his own knowledge. Another member of the deputation (apparently on behalf of all) asked whether the people might wear Khaddar and Gandhi caps. The District Magistrate said they might but must take the risk of being confused with the volunteers who were going about with their usual badges, and that the volunteers would not be allowed to remain in the town any longer. The deputationists requested the District Magistrate to speak to the District Superintendent of Police to which the District Magistrate said he had already

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done so. In fact the District Magistrate had already urged the District Superintendent of Police to see that his men kept within the law. The deputation naturally understood that there was nothing illegal in merely wearing Khaddar or the Gandhi cap and that the District Magistrate had already taken steps to prevent molestation by the Police for wearing such dress. The only practical inconvenience for people so dressed was of being mistaken by the Police for volunteers who were required to leave the place as most of them were strangers at Guntur.

The deputation having got the District Magistrate's assurance of protection from unlawful molestation thought it proper in order to allay public excitement to intimate the fact to the people who were making complaints of molestation and ordered a handbill in the following terms to be printed in a local press:—

"When we went to the Collector to-day and told him about the conduct of the Police, he told us that he would take proper steps to see that the Police do not molest volunteers or other residents of the town for merely wearing Khaddar or the Gandhi caps."

Then follows the names of the deputationists. The Police came to know that this handbill was being printed with a view to its circulation. They thereupon went to the Press and seized all the copies before any could be circulated and immediately made an application to the District Magistrate stating as follows:—

"There was information that about nine people of Guntur approached the District Magistrate, Guntur and made allegations against the Police and that the District Magistrate did not believe them. To incite the public to gradually defy the orders under section 144, Criminal Procedure Code, issued by him on the 15th instant, these people sent a notice to the Vani Press for printing and to give them a number of copies for publication in Guntur Town These notices contain falsehood carefully and cunningly worded The publication of these notices in Guntur Town may lead to breach of peace and public tranquillity I produce a copy of the notice. I want an order under section 144, Criminal Procedure Code, issued prohibiting the wearing of Gandhi caps by the public in general in Guntur Town and within five miles of its boundary"

Thereupon, the District Magistrate passed the order in question which is as follows:—

"Whereas the public tranquillity has been disturbed by the Civil Disobedience Movement and wearing of the Gandhi cap is a symbol of sympathy with that movement and whereas information has been laid before me that a notice is about to be issued to the public in general which will have the effect of inciting them to wear Gandhi caps and (so) disturb the public tranquillity, I . . . District Magistrate, consider that immediate prevention is desirable and direct every member of the public in general to abstain from wearing a Gandhi cap when in any place frequented by the public within the limits of Guntur Municipality and a radius of five miles therefrom for a period of two months from this date."

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The petitioner, an advocate and secretary of the Bar Association of Guntur, purporting to act in pursuance of a resolution of that body, petitioned the District Magistrate on the 2nd of July under section 144 (4) to rescind the above order stating that the handbill mentioned in the order was not an incitement to commit any illegalities at all, but only intimation of the fact that the District Magistrate himself had promised to protect the people against molestation for wearing Gandhi caps and Khaddar, that there was neither imminent nor in fact any danger of any breach of the peace or of the public tranquillity by reason of the people wearing Gandhi caps, that the public had a right to wear what dress they liked and that the order was an unwarranted interference and not being justified by any interest of the public peace should be rescinded. When the petition came on for hearing, no witnesses were examined at all, but the petitioner was allowed to file on the 8th of July an affidavit setting out more fully the contents of his petition. It referred to the representation of the deputation and the petition put in by them and asked that it might be exhibited in the case. It denied the allegation in the first information report by the Police that the District Magistrate, in the interview the deputationists had with him, said that their representations were all false; it denied the allegation of secret meetings in the houses of people to concert measures to throw obstacles in the way of the Police and concluded by stating that the handbill proposed to be circulated only stated the fact which was true that the District Magistrate had assured the deputation of protection from illegal molestation for wearing Gandhi caps and Khaddar dress. On the other side the Police through the Public Prosecutor contented themselves by filing a Memorandum of Objections. Not even an affidavit was filed. The Memorandum of Objections stated that the petitioner had no *locus standi* to move the Court as he was not a person aggrieved by the order and it ended by the surprising statement that "on the merits of the case it is not proposed to make any reply as the application is manifestly unsustainable." On these materials, the District Magistrate passed his order of the 10th July declining to interfere.

Before proceeding further, I think that when an *ex parte* order under section 144 is called in question under clause (4) of that section, the normal procedure should be for evidence to be recorded in the usual way by examination and cross-examination of witnesses in open Court. The proceeding is a judi-

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cial one *Muthuswami* v. *Thangammal Ayiyar*[1] and though I am not aware of any provision in the Criminal Procedure Code prescribing the mode of taking evidence in such an enquiry it is desirable whenever possible to adopt the normal procedure. The learned Advocate-General conceded that the normal procedure of recording evidence in open Court should ordinarily be adopted. But he stated that in this case no evidence had been shut out. The difficulty in this part of the case is that on the crucial point, namely, whether the wearing of Gandhi caps has any reasonable connection with disturbance of the peace or public tranquillity, the order entirely rests on statements contained in itself which there is no means of testing by the evidence. The main point is whether there was any such urgent apprehended danger as called for action under the section and, if there was, whether the act prohibited, namely, the wearing of Gandhi caps, was such as was likely to prevent or tended to prevent the threatened disturbance of public tranquillity. The Magistrate first considers as the main question whether the Gandhi cap is part of the ordinary dress of the people. He may have been misled into thinking that this was the main question by the contention of the petitioner before him that the Gandhi cap was the ordinary dress of the people. The Magistrate came to the conclusion that in that part of the country the Gandhi cap was not the ordinary dress of the people but had become general among the followers of Mr. Gandhi for about ten years. As he puts it, it showed that the wearer was interested in something in which Mr. Gandhi was interested. To that extent I agree with him but when he goes on to say that because the Gandhi cap shows sympathy with something in which Mr. Gandhi is interested, and because Mr Gandhi is now interested in the Civil Disobedience Movement, the wearers of Gandhi caps are also sympathisers with the Civil Disobedience Movement, I must with respect disagree. The question is really one of general knowledge, and this Court is as much in a position to know matters of general knowledge as the Lower Court. It is impossible for me to say that at the present day people who wear Gandhi caps may be inferred therefrom to be supporters of the Civil Disobedience Movement. Such an inference would be an injustice to those numerous persons who have been wearing that cap as a mark of sympathy with Mr. Gandhi's views from a time long anterior to the Civil Disobedience Movement. For, it is well known that

1 (1929) I.L.R. 53 M. 320: 58 M.L.J. 148

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Mr. Gandhi is interested in several other things than the Civil Disobedience Movement which have or ought to have no connection with it; for instance, elevation of the depressed classes, prohibition of child marriage, encouragement of Indian industries and temperance. It is unjust to those who take an interest in Mr. Gandhi's harmless activities to impute to them sympathy with Civil Disobedience Movement because they wear Gandhi caps. Finally, the representation by the deputation of ill-usage by the Police of wearers of Gandhi caps and the District Magistrate's opinion that people might wear such caps provided that they did not mind the risk of being mistaken for volunteers and his warning to the Police to keep within the law all show that on the 18th June the Gandhi cap was not in the opinion of the District Magistrate an emblem of the Civil Disobedience Movement.

What then was the urgently apprehended danger? From the order as first issued, it would appear as though the apprehended danger was the wearing of Gandhi caps by the people of Guntur. Obviously the danger intended by the section is a danger to the public tranquillity. It is difficult to see how the wearing of caps was in the circumstances in itself a danger to public tranquillity. The Magistrate explains that in the order originally issued the word "so" was by a clerical error omitted before the word "disturbed". When the omission is supplied he says that the intention of the order is clear. I do not see how the addition of the word "so" supplies the missing link unless we are to suppose, as apparently the Magistrate was of opinion, that the wearing of Gandhi caps was itself a disturbance of the public tranquillity. It seems to me that the order discloses a confusion of thought by identifying disturbance of the peace or tranquillity which is the apprehended danger with the act or acts which are to be forbidden as a means of preventing the danger. In short, the order does not disclose any danger to the public peace itself unless we are to suppose that the wearing of caps became on 20th June an indication of danger to public peace or tranquillity. If on the 18th the wearing of these caps was permissible and the only danger was to the cap-wearers themselves of the Police mistaking them for volunteers, how did the caps become on the 20th a danger to the public peace?

The most important point in the case is whether the prohibition of the cap was necessary in the interests of peace in the sense that it was likely to prevent or tended to prevent the dis-

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turbance of the public tranquillity. On this point, I adopt the learned Advocate-General's words when he said that the real test to see whether the present order was justified or not is to find out whether the act, be it lawful or unlawful, was likely to lead to a breach of the public tranquillity. On this point, the learned advocate for the petitioner has subjected paragraph 5 of the Magistrate's order of the 10th July to a searching and rigorous criticism. He argues that instead of founding himself on probabilities the Magistrate has relied on surmises in trying to establish a connection between the Gandhi caps and public tranquillity. I do not agree with the advocate's criticism that the object of the order was political. There is no reason to regard the object of the order as otherwise than what it should be, but that is not enough. It must be supported on substantial grounds. The substance of the criticism is that an act prohibited under section 144 must only be so prohibited if it is likely to prevent obstruction, etc., or disturbance of the public tranquillity, etc. Now this likelihood or tendency must in my opinion be a reasonable or proximate one. It is not enough to say that by stretching several possibilities one after the other it is possible to establish a connection of cause and effect between the act prohibited and disturbance of the public tranquillity. That connection must not be merely speculative or distant. The question whether in each particular case the case falls on one side or the other is one eminently of sound judgment and no rules can be laid down for its exercise. Where there are special facts relating to a particular locality as to which the local authority is the best judge the opinion of that authority will not easily be disturbed; but where there are no special circumstances and the matter is one of general impression the absence of any near or reasonable connection between the prohibited act and the supposed danger to public tranquillity will be a ground upon which this Court is bound to act. The order of the Magistrate shows that the connection between the Gandhi caps and the Civil Disobedience Movement which disturbs public tranquillity is only a distant and possible one and not a near and probable one. He says that "a sudden increase in symbols of sympathy" by which he means caps "with a movement which had just had a serious set-back could have no other effect than to assist the movement." If the so-called increase in cap-wearers was due to the alleged interference by the Police, which had temporarily diminished the number, becoming known to be unauthorised there would be really no increase at all, but those people who had been

P. C.

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Commissioner of the Central Provinces, which partly affirmed and partly reversed a judgment and decree, dated the 14th December, 1920, of the Additional District Judge of Nagpur.

The suit in which the said decrees were passed was brought by the appellants in 1917 for recovery of properties which were alleged to have belonged to a Hindu joint family and to belong at the time of suit to the appellants as sole surviving members of that joint family, and the main question for determination on the present appeal was whether the appellants (plaintiffs) were or were not joint in estate with one Narayan Rao II. at the time of his death in 1916, leaving property valued at two crores of rupees. With regard to some of the properties an incidental question of limitation was also involved.

The material facts of the case are sufficiently fully set out in their Lordships' judgment.

Dube for appellants.

Upjohn, K.C. and *Parikh* for respondents.

19th December, 1930. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The parties to this suit belong to a family of Mahratta Brahmins from Berar, who ever since the year 1839 have been carrying on business as money-lenders or bankers at Pardi, three or four miles from Nagpur in the Central Provinces.

The property in suit, which is valued at two crores of rupees (considerably more than one and a half millions sterling), was acquired in the business carried on by the senior branch of the family at Pardi and in recent years at Nagpur. In 1916, Narayan Rao II. (so described to distinguish him from the common ancestor of the same name), who was then the sole survivor of the senior branch, died, leaving an infant daughter, but no male issue. Thereupon Govindrao, the first plaintiff, who with his son, the second plaintiff, now represents the junior branch of the family, claimed to have become entitled by survivorship to the whole of the suit property as the joint family property of the undivided family, and in 1917 filed the present suit in the District Court of Nagpur, impleading as 1st defendant Narayan Rao II.'s daughter and as 2nd defendant a boy who is alleged to have been adopted by his widow. This adoption was disputed by the plaintiffs, and was made the subject of an issue which it was found unnecessary to decide. The

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relationship of the parties and their descent from the common ancestor are shown in the following genealogical table:—

NARAYAN RAO I.

Gopalpanth (died 1885).
Tanbaji = Laxmibai
Ramchandra *alias* Babaji
Sonbaji = Sitabai (died 1880). (died 1887).

(Tanbaji and Ramchandra predeceased Gopalpanth and Sonbaji).

Ganpatrao = Gangabai. (died 1913).

Narayan Rao II. = Chandrabhagabai (adopted in 1874; (died 8th February, 1916). died 21st June, 1916).

Govindrao (adopted; Appellant No 1).

Sadasheo *alias* Baburao (Appellant No. 2).

Anna *alias* Madhorao (alleged adopted son; Respondent No. 2).

Rajabai (Respondent No. 1).

The defendants' case is that the business was the separate property of Narayana I.'s eldest son, Gopal, from whom they are descended, that Gopal's youngest brother, Sonbaji, the first plaintiff's adoptive father, never had any interest in it, but had carried on a separate money-lending business in his own name at Pardi from 1865 until his death in 1880, and that after attaining majority the first plaintiff had carried on this business for more than twenty years until the death of Narayan Rao II. without putting forward any claim to share in the business or property of the senior branch.

Very numerous issues were framed by the District Court with reference to the specific allegations in the pleadings, but the questions which arise on the evidence and on which the case has been disposed of in the Lower Courts may be formulated as follows:—

I. Was the money-lending business which was started in the name of the family god in 1839 at Pardi, where the four brothers were living together, and was managed by the eldest son Gopal, a joint family business, or was it Gopal's separate business?

II. If the business was originally a joint family business, was there a separation in 1865 some years after the death of the second and third brothers, when Gopal began to carry on business in his own name instead of in the name of the family god, and Sonbaji began to carry on business in his own name

at Pardi, and were there two businesses thenceforth, the separate properties of each of the two brothers?

III. Is the suit as to the whole or part of the suit property barred by limitation?

It appeared from the accounts produced by the defendants that the second brother, Tanbaji, who died in 1853, and the third brother, Ramchandra, who died in 1861, had each carried on a money-lending business in separate premises at Pardi, and it was held by the Court of the Judicial Commissioner of the Central Provinces, on appeal from the decree of the District Court, that there never was any joint family business, and that the businesses carried on by the four brothers were separate. This finding disposed of the case except as to four villages and to some house property at Nagpur, which will be dealt with later.

Mr. Upjohn, for the 2nd respondent, contended that the judgment of the District Judge was to the same effect, and that there were concurrent findings with which the Board would not interfere.

The Appellate Court, however, read the judgment of the District Judge as holding that Gopal and his three brothers were originally joint in mess, worship and business, and that, after the death of the other two brothers, Gopal and Sonbaji separated at or about the time when Sonbaji opened a shop in his own name in the year 1865, and that henceforth there was a separation. Though the language of the judgment is not entirely consistent, the finding at which the Trial Judge ultimately arrives in paragraph 70 of his judgment is that Gopal and Sonbaji were separate in mess, residence, estate, worship and business some years before the death of Sonbaji in 1880, and that Gopal and Sonbaji's son Govindrao, the first plaintiff, were so separate all along; and later in his judgment, when dealing with the four villages already mentioned, which had been registered in the joint names of Gopal and Sonbaji, he applied Art. 127 of the Limitation Act, which deals only with joint family property, thereby indicating that he regarded them as having been acquired in a joint family business. Their Lordships are therefore of opinion that Mr. Upjohn's contention as to concurrent findings cannot be sustained.

It is obviously impossible eighty years later and in the absence of any written record to say whence came the funds with which the business was started. Narayan Rao I. is said to have been a poor man and it is not proved that the business was started with the aid of any nucleus of ancestral property

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derived from him. Even so, it has been strenuously contended by Mr. Dube for the appellants that the facts that the four brothers were living together and were joint in food, residence and worship and that the business was managed by the eldest brother Gopal raise a presumption that it was a joint family business and was not his separate business. He also contended that the businesses carried on at Pardi and by Tanbaji till his death in 1853 and by Ramchandra till his death in 1861 were merely branches of the joint family business, as appears from the fact that they were not inherited after their deaths without male issue by their wives and daughters, but were treated as joint family property, and carried on for a great many years by the eldest brother Gopal, who ultimately closed them, and transferred the assets and liabilities to the main business.

It is, in their Lordships' opinion, unnecessary to pursue this subject, as to which reference may be made to the judgment of the late Sir Bhashyam Aiyangar in *Sudarsanam* v. *Narasimhulu Maistri*,[1] because, assuming in the appellants' favour that, to begin with, there was a business belonging to the joint family, there is no sufficient reason for differing from the District Judge's finding that after 1865 Gopal and Sonbaji, the surviving brothers, were separate and had separate businesses. This finding is based on a most careful and exhaustive examination of the mass of accounts and documents put in evidence regarding the period between 1865 and Sonbaji's death in 1880. The Appellate Court has also most carefully analysed this evidence in its judgment and has arrived at the same conclusion.

It would be very difficult for their Lordships to differ from what is practically a concurrent finding of both the Lower Courts in this particular matter, and they are the less disposed to do so because in their opinion that finding is in accordance with the general probabilities of the case and the subsequent conduct of the parties.

In 1865 Gopal ceased to carry on business in the name of the family god and began to carry on business in his own name, and Sonbaji opened a new business in his own name. There were already, according to the plaintiffs' case, three branches of the joint family business at Pardi, and it is difficult to explain Sonbaji's action in opening another business there except

1. (1901) I.L.R. 25 M. 149: 11 M.L.J. 353.

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on the footing that the two brothers were thenceforth to carry on business separately.

Further, both the Lower Courts have assigned good reasons for holding that the first plaintiff has suppressed the books of his father Sonbaji's business for these years, and have rightly drawn the inference that, if produced, they would not have supported him.

Lastly, what happened after Sonbaji's death, especially after the first plaintiff attained majority in 1896 or earlier, in their Lordships' opinion affords practically conclusive evidence that the two businesses were separate.

After Sonbaji's death in 1880 the first plaintiff's mother was appointed guardian of his property and asserted that he was separate. She died in 1887, two years after the death of Gopal, and Gopal's son Ganpat, as the nearest agnate, took over the management of the minor's business; but before doing so he took care to have lists prepared of the minor's property, and it is found by both the Lower Courts that the listed properties were duly handed over to the plaintiff on his attaining majority as his separate property and accepted by him as such.

It is, however, urged that Gopal and his son were interested in making out a case of separation, and that no weight should be attached to what they did or to what was done by the minor's mother and guardian, as she may have had no knowledge of the real state of things and have acted under their influence.

Their Lordships are fully alive to this consideration, but in this case, as already stated, there is strong evidence to show that a separation in business had taken place before Sonbaji's death, and the first plaintiff's own conduct after he attained majority appears to be inexplicable on any other basis. According to his present case, he might at any time have insisted on a partition, which would have made him a very rich man, but he accepted the properties which were then handed over to him, and enjoyed them as his separate property for more than twenty years.

At the re-settlement in 1912, when Ganpat applied that one of the four villages which had been acquired before 1865, and stood in the names of Gopal and Sonbaji, should be registered in his own name, as he had been in possession of it for many years, it appears from the order of the Settlement Officer that the first plaintiff, who opposed the application, admitted that he was separate in business from Ganpat, and merely put forward the case that this particular village was joint family property which had not been divided.

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Ganpat died in the following year, and the first plaintiff made no claim as the senior coparcener to the management of the joint family business, but allowed Ganpat's son Narayan Rao II. to succeed to the management of the properties now in suit. It was only after Narayan Rao's unexpected death without male issue in 1916 that he for the first time asserted that they were joint family properties which he was entitled to take by survivorship.

In their Lordships' opinion, looking at the evidence as a whole, the only possible conclusion seems to be that the two branches of the family and their businesses had long been separate, and that Govindrao had no share in the business of the senior branch, and that the claim put forward on this footing was rightly rejected by both the Lower Courts.

On the defendants' cross-appeal as to four villages for which the plaintiffs had obtained a decree the Appellate Court allowed the appeal and held the suit was barred by limitation.

In accordance with their finding that there never was any joint family property, they held that if the plaintiffs' branch ever had any interest in these villages, which they seem to have doubted, the suit was barred by limitation, as the defendants' possession had been adverse to them for more than the statutory period. If the villages were not joint family property, it was not disputed that Art. 144 was the article applicable, and the question was whether the defendants' possession had been adverse to the plaintiffs for more than the statutory period. It was contended by Mr. Dube that, if not, they were held by the parties as tenants-in-common, and that the possession of one tenant-in-common was not adverse to the other, citing *Corea* v. *Appuhamy*[2]. In that case, however, what was decided by the Board was that the possession would not be adverse until *ouster*.

The defendants' predecessors had not only been in sole possession and perception[3] of the profits of these villages for more than the statutory period, but as regards three of them, there were revenue proceedings between Gopal and the first plaintiff's guardian Sitabai in 1884, in which Gopal claimed mutation in his sole name and denied that the first plaintiff had any interest in them.

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2. (1912) A.C. 230.

3. Participation (?).

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As regards the fourth village, there is no express evidence of his title having been denied before the settlement proceedings in 1912, which have been already referred to; but having regard to the separation of the two branches of the family, and to the fact that the 1st plaintiff never had possession or participation of profits in all these four villages ever since his father's death in 1880, and that they were not included in the property handed over to him by Ganpat on his attaining majority, he must have known that his interest in them was not admitted, and their Lordships are of opinion that on these facts the Appellate Court was justified in holding that the possession of the defendant was adverse for more than the statutory period.

Their Lordships are also of opinion that, even if the villages were originally joint family property, as held by the District Judge, the claim was equally barred under Art. 144, and that the District Judge was wrong in applying Art. 127. Assuming that Gopal and Sonbaji were at one time joint in estate, the District Judge has found, and their Lordships see no reason to differ from that finding, that they had separated before Sonbaji's death, and the effect of that separation was that any immovable joint property which continued undivided was no longer joint family property so as to come under Art. 127, but came under Art. 144.

For these reasons their Lordships are of opinion that the decree of the Appellate Court was right and that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE REILLY AND MR. JUSTICE SUNDARAM CHETTY.

In the matter of a First Grade Pleader, Vellore*.

F. B.

In the matter of a First Grade Pleader, Vellore.

Legal Practitioners Act (XVIII of 1879), S 13 (b) and (f)—Pleader obtaining adjournment of case on grounds known to be false—Professional misconduct—Duty of legal practitioners to Court.

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*19th January, 1931.

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If a legal practitioner deliberately for the purpose of impeding th course of justice makes a statement to a Court which he knows or believ to be untrue and thereby gains an advantage for his client, he is guilty o grossly improper conduct and as such renders himself liable to be dea with by the High Court in the exercise of its disciplinary jurisdiction

Where a pleader repeatedly applied for the adjournment of a ca pending before a Magistrate on the ground that his client intended to mov the High Court for a transfer of the case but it appeared from the pa conduct of the client and the surrounding circumstances that the plead must have known while applying for adjournment that the purpose fo which the application was made would never be carried out,

Held, that the pleader was guilty of professional misconduct.

Pleader suspended from practice for three months.

Per the Chief Justice.—Legal practitioners owe a duty to the Cour They must not mislead the Court They must not ask for adjournmen for their clients when they know that the reasons they are putting forwar are untrue or have reason to believe are untrue. They must only mak applications which they believe to be well-founded

The notice under section 13 (*b*) and (*f*) of the Leg Practitioners Act issued to Mr. K. V. Aiyar, Pleader, Vellor calling upon the said Mr. K. V. Aiyar to show cause why h should not be dealt with under the disciplinary jurisdiction o the High Court for his grossly improper conduct in the di charge of his professional duty in that he in his capacity a Pleader engaged for the accused in C.C. No. 606 of 1929 o the file of the Court of the Sub-Magistrate of Polur applie for adjournments of the said Case No. 606 of 1929 on 8t February, 1930, 27th May, 1930 and 24th June, 1930, on th ground that he would move the High Court for a transfer o the case and having secured the grant of these adjournmen he took no steps to move the High Court and that he withdre from the said case on 7th July, 1930, without offering an explanation therefor and that his applications for adjournmen were not *bona fide* but were made only with the object of pro longing the case unnecessarily and defeating the ends of justic and that he thereby rendered himself liable to be dealt wit under the disciplinary jurisdiction of the High Court.

The Advocate-General (*A. Krishnaswami Aiyar*) for th Crown.

L. A. Govindaraghava Aiyar and *P. S. Ramachandra Aiy* for Pleader.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—This matter comes befo us under section 13 (*b*) and (*f*) of the Legal Practitioners Ac The charge against the legal practitioner here is that on thr

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different occasions he applied for adjournment in the Court of the Sub-Magistrate at Polur on the ground that the High Court would be moved for a transfer of the case and that he took no steps at all on those occasions either himself or by means of his client to move the High Court. It is charged against him that he applied for those adjournments with the deliberate intention of delaying the course of justice. I am quite satisfied that if it is proved against a legal practitioner that he deliberately for the purpose of impeding the course of justice makes a statement to a Court which he knows or believes to be untrue and thereby gains an advantage for his client, he is guilty of grossly improper conduct and as such renders himself liable to be dealt with by the High Court. In this case of course it is not suggested that he has been guilty of fraudulent conduct in the sense that the word "fraudulent" is usually used, but it is alleged that his conduct has been grossly improper. The three dates upon which the legal practitioner applied for adjournments are the 8th February, 1930, the 27th May, 1930 and the 24th June, 1930. His client was charged with the offence of criminal breach of trust. On the 4th October, 1929, appearance was entered on behalf of the accused person by the legal practitioner in this case. Previous to this the accused in Magistrate's Court had obtained an adjournment and actually presented a petition to the District Magistrate which was rejected. After the legal practitioner had entered his appearance on behalf of his client, the client applied for adjournments twice on his own behalf for the purpose of moving the High Court and one adjournment was granted and the other refused but on neither occasion were any steps taken to move the High Court and it is highly improbable that the practitioner was unaware of this. Then we come to the three occasions upon which the practitioner himself on behalf of his client presented petitions for adjournment. The first, as I have already stated, was on the 8th February of this year. The reason assigned then for an adjournment for the purpose of moving the High Court was because it was contended on behalf of the accused that the offence with which the accused was charged was not one of criminal breach of trust but one of cheating under section 420, Indian Penal Code, and that the Sub-Magistrate of Polur had therefore no jurisdiction to entertain that charge. An adjournment was granted for the purpose of taking that question up to the High Court but no steps were taken either by the legal practitioner or by his client. Then on the 27th May one of the defence witnesses was available in Court and

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ready to be examined. But the accused did not wish that witness to be examined as the other defence witnesses were not ready and an adjournment was asked for the purpose of having all the defence witnesses summoned and examined on the same day. That application was refused by the Magistrate. Then an adjournment was asked for by the legal practitioner for the purpose of making an application to the High Court against that order and it was granted. It does not seem to me to have been reasonable to ask for an adjournment of the case to some future date in order to examine all the defence witnesses. One of the defence witnesses was there and he could have been examined but it has been stated on behalf of the legal practitioner by Mr. L. A. Govindaraghava Aiyar that it was probably because it was thought more convenient to call the defence witnesses in a certain order. However that may be, no steps were taken to move the High Court in the matter so that we have here the second occasion on which the legal practitioner asked for an adjournment for a purpose which was never carried out. The third occasion was on the 24th June of this year. The case had been adjourned for hearing to the 21st June by the Sub-Magistrate and on that date the accused sent a telegram stating that he was ill and unable to attend Court. The Magistrate who had by this time formed a reasonable opinion with regard to the tactics being pursued by the accused would not accept that statement of the telegram or the excuse and ordered the accused to be brought to Court on a non-bailable warrant and he was produced in Court on the 24th June. With him came a medical certificate granted by a local dispensary showing that the accused had attended as an out-patient that dispensary on the 21st June, the very day when the case should have been taken up by the Magistrate; but the nature of the illness from which the accused in that case was suffering was not stated in the certificate. With that certificate before him and the previous history of the case in his mind, the Magistrate refused to grant bail to the accused. Thereupon he was again asked by the practitioner for an adjournment again for the purpose of moving the High Court. That he refused to grant but later on in the same day he granted an adjournment for fourteen days for the purpose of the High Court being moved. After thirteen days had elapsed and no steps whatever had been taken to move the High Court the practitioner withdrew from the case. That was on the 7th July, 1930.

The charge against the practitioner is that he was not acting *bona fide* in the matter and that he knew perfectly well

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when he asked for adjournment for the purpose of moving the High Court and obtained them that that purpose was not going to be carried out and that he therefore impeded the course of justice. This of course is not a matter of direct evidence at all. One cannot look into the mind of the practitioner and say how much he knew, how much he did not know of what his intention was. His intention has to be gathered from the circumstances of the case and if the inference is so strong that it leads us to the conclusion that he knew perfectly well when he asked for adjournment and obtained them that the purpose for which the adjournments were asked was not going to be carried out then he has been guilty of grossly improper conduct. The facts of the case here are that to the practitioner's knowledge obviously before he himself commenced asking for adjournments, his client had twice asked for adjournment for the purpose of moving the High Court but had taken no steps whatever in the matter. Then he himself asked for an adjournment for a similar purpose and that purpose was not carried out. That was repeated a second time and it was repeated a third time. With the knowledge the legal practitioner had before him of what his client had done before he ever started making applications on his behalf and with the knowledge that on the first occasion on which he himself gained an adjournment no attempt was made to move the High Court nor on the second occasion; on the third occasion the inference is well-nigh irresistible that he knew perfectly well when he asked for the adjournment that he was putting forward a misrepresentation for the purpose of gaining a benefit for his client and that the High Court would never be moved by him. In his written explanation he says that he did this on the instructions of his client. He seems to think that it is the duty of a legal practitioner blindly to follow every instruction his client gives him. That is an entire misapprehension of the duty of a legal practitioner. He has not only got a duty towards his client but he has got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted. He must not trick or deceive the Court or attempt to gain for his client an advantage by dishonest means. To attempt to obtain adjournments by misrepresentations and to put forward a purpose which the legal practitioner knows will never be carried out is to attempt to gain and to gain an advantage by a trick and a very dishonest one too. It is to be noted also that in his written explanation he says that he withdrew from the case because his client was in want of funds and that his client's creditors were pressing

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD TOMLIN, LORD MACMILLAN, SIR JOHN WALLIS, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Sri Kanchumarti Venkata Krishnayya Garu .. *Appellant**

v.

The Secretary of State for India in Council, represented by the Sub-Collector of Godavari .. *Respondent.*

P. C.

Sri Kanchumarti Venkata Krishnayya Garu *v.* The Secretary of State for India in Council.

Land Acquisition Act (I of 1894), S. 18—Validity of reference by person not "interested"—Waiver of objection.

Although an application under S. 18 of the Land Acquisition Act, 1894, requiring the Collector to make a reference to the Court can only be preferred by a person "interested", an objection that the party had no *locus standi* to make such application, and that the reference was in consequence invalid, should be taken at the first opportunity, and if not so taken must be considered to have been waived.

Judgment of the High Court, Madras, reversed.

Appeal No. 17 of 1929 from a judgment and decree, dated the 7th March, 1927, of the High Court, Madras, which varied a judgment and decree, dated the 16th October, 1924, of the District Judge of Godavari.

The material facts of the case appear sufficiently fully from their Lordships' judgment.

Dunne, K.C. and *Narasimham* for appellant.

De Gruyther, K.C. and *Dube* for respondent.

Dunne, K.C. (with *Narasimham*) for appellant.—The reference to the Court was made, we submit, on the application of the person "interested". Nobody objected before the District Judge that the proceedings were not well-founded.

[LORD TOMLIN.—Did the Government take objection?]

No; they did not. The appellant was heard on the merits before the District Judge, and he got the award enhanced.

[LORD TOMLIN.—If proceedings are fought out in the Lower Court, such an objection cannot be entertained in appeal.]

On the merits, we submit that the amount awarded as compensation is too low.

De Gruyther, K.C. (with *Dube*) for respondent.—No question of principle being raised, the present appeal to the Board is incompetent. Their Lordships have said in several cases that they will not entertain appeals on mere questions of valuation (*Nowroji Rustomji Wadia* v. *Bombay Government*[1].)

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*P.C. Appeal No. 17 of 1929. 13th January, 1931

1. (1925) L.R. 52 I.A. 367: I.L.R. 49 B 700: 49 M.L.J. 233 (P.C.).

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The reference in regard to Survey No. 119 B_2 was not made at the instance of any person "interested".

13th January, 1931. Their Lordships' judgment was delivered by

SIR JOHN WALLIS.—This is a land acquisition case and comes before the Board on appeal from a judgment of the High Court at Madras varying the judgment of the District Judge of Godavari at Rajahmundry on a reference under section 18 of the Land Acquisition Act as to the amount of compensation payable for land taken up for the new buildings to be erected for the Arts College and the Training College at Rajahmundry. The land, which is situated on the outskirts of the town and within the municipal limits, lies between two roads leading out of Rajahmundry, and now has a frontage to both roads. Survey Nos. 123 and 124, which cover 49·24 out of the 50·70 acres taken up, formerly had a frontage to only one of these roads and were separated from the other road by Survey No. 119 B_2. A few years before the acquisition the present appellant, K. V. Krishnayya, who was the registered owner of Survey Nos. 123 and 124, acquired Survey No. 119 B_2 from the Government, and thus obtained for his property a frontage to both roads, thereby enhancing its value as building land.

Prior to the 7th July, 1921, the date of the Notification under the Act, K. V. Ramachandra Rao, a cousin of the appellant, had filed a suit against him to recover possession of all three survey numbers, and had obtained a decree as to Survey Nos. 123 and 124 in the Court of the Subordinate Judge, but had failed as to the recently-acquired Survey No. 119 B_2, and the defendant had preferred an appeal to the High Court.

On the 6th November, 1921, the Collector made his award, and, having notice of the dispute, on the same day made a reference to the District Court under section 30 of the Act as to the persons to whom the compensation was payable.

The amount of the compensation awarded can only be questioned on a reference under section 18 which the Collector is required to make on the application within the prescribed time of any one interested; and the main question in this appeal is, was there any such reference in respect of Survey No. 119 B_2?

Under section 12 (1) of the Act the Collector is required to give immediate notice of the award to such of the persons

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interested as were not present personally or by their representatives when the award was made.

It does not appear whether the appellant, K. V. Krishnayya, was present when the award was made or not; but, if not, he would have been entitled under section 18 of the Act to require the Collector to make a reference to the District Court about the amount of the compensation within six months of the award; that is to say, before the 6th May, 1922, unless he had been served with notice of the award, in which case the application must have been made within six weeks of the date* of the notice.

The appellant, K. V. Krishnayya, did not make any application for such a reference under section 18 as to the amount of compensation, but on the 12th January, 1922, such an application was made by K. V. Ramachandra Rao, the plaintiff in the suit already mentioned, with reference not only to Survey Nos. 123 and 124, as to which he had succeeded, but also as to Survey No. 119 B2, as to which his suit had been dismissed.

As the District Judge disposed of the references under section 30 and under section 18 together, it may be taken that the Collector duly made the reference to the District Court under section 18 on the application of K. V. Ramachandra Rao of the 12th January, 1922; and it then became the duty of the District Court under section 20 to issue notice to the appellant, K. V. Krishnayya, specifying the day on which the Court would deal with the objection under section 18 to the amount of the award, and directing his appearance on that day before the Court.

As early as the 19th December, 1921, as appears from the Diary, the District Court had directed notice of the reference under section 30 to be given to both parties for the 12th January, 1922, but that notice was not served on the appellant, K. V. Krishnayya. On the 23rd February, 1922, fresh notice to him was ordered for the 24th March, 1922, and on that day he appeared by his vakil. The diary contains the further entry, "Adjourned to 21st July, 1922, for inquiry."

As the Diary contains no mention of any separate notices of the reference under section 18, it may be taken that the appellant in both references was treated as having entered an appearance. Had the objection then been taken that there was no reference before the Court under S. 18 as to 119 B2,

*The word "date" is apparently a slip for "receipt".

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as K. V. Ramachandra Rao, on whose application the reference had been made, had no interest in it, the appellant, K. V. Krishnayya, unless he had been present or represented before the Collector at the time the award was made, would have been still in time, as already shown, to require the Collector to make a fresh reference in regard to it. No such question was raised, and the reference was allowed to proceed as to all three Survey Numbers and judgment was given on the 16th October, 1924.

The appellant, K. V. Krishnayya, preferred an appeal from this judgment, and when the appeal came before the High Court the Government Pleader for the first time raised the objections that the appellant was not entitled to be heard at all, as he had not himself made an application under section 18 requiring the Collector to make a reference to the District Court, and, secondly, that he was not entitled to appeal as to the amount of compensation for Survey No. 119 B2, as the other claimant, K. V. Ramachandra Rao, who made the application, had no interest in it, as his suit as regards this Survey Number had been dismissed by the judgment of the Subordinate Judge, and he had not appealed from that judgment.

The High Court, in their Lordships' opinion, rightly disallowed the first objection, but they sustained the second, and held that the appellant was not entitled to appeal as to the valuation placed by the District Judge on Survey No. 119 B2, as there had been no reference in regard to it.

In their Lordships' opinion, the highly technical objection that the application requiring the Collector to make a reference with regard to Survey No. 119 B2 should have been made by the appellant, K. V. Krishnayya, and not by the other claimant, K. V. Ramachandra Rao, should have been taken at the first opportunity when, as already shown, it might possibly have been met by making a fresh application, and not having been so taken must be considered to have been waived. Secondly, their Lordships are of opinion that the objection, when taken, should have been overruled. Though the second claimant, who was plaintiff in the suit before the Subordinate Judge, had not preferred an appeal from the decree dismissing his suit as to Survey No. 119 B2, it was still open to him to file a memorandum of objections with regard to it in the appeal which had been preferred by the defendant, K. V. Krishnayya, and he had consequently an interest in that Survey Number entitling him to make an application with regard to it under section 18 of the Act.

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Objection has also been taken to the methods of valuation adopted in the Lower Courts, and it has been argued that the appellant has been seriously prejudiced by the fact that the three Survey Numbers were valued separately and not as constituting one area in single ownership, and that, as owing to the purchase by the appellant of Survey No. 119 B2 before the date of the acquisition, Survey Nos. 123 and 124 were no longer cut off from access to the road by a narrow strip of land forming part of 119 B2, some part of them at least became just as available for building as Survey No. 119 B2 itself and should have been so valued.

In their Lordships' opinion, so far as the award of the Collector and the judgment of the District Judge are concerned, the objection is well founded, and they should have considered whether those portions of Survey Nos. 123 and 124 which now have access to the road should not be valued as building instead of agricultural land. It is, however, in their Lordships' opinion, by no means made out that the learned Judges of the High Court fell into the same error. Whilst holding themselves precluded from reviewing the valuation of 119 B2, they have held that 16 acres out of the 49·24 acres in Survey Nos. 123 and 124 should be treated as building land and not as agricultural land, and have placed on them a higher valuation than had been placed by the District Judge on Survey No. 119 B2, treating it as building land.

As, however, the case has to go back with reference to the valuation of 119 B2, their Lordships think it will be more satisfactory not to tie the hands of the High Court when the case goes back by confining the remittal to Survey No. 119 B2 ; and they will accordingly humbly advise His Majesty to discharge the order of the High Court and remit the case back to the High Court with a direction that they take into consideration the appeal to them from the District Court in relation to Survey No. 119 B2 as well as Survey Nos. 123 and 124, and that, in considering to what extent they should be valued as building land, regard should be had to the fact that at the date of acquisition they constituted a single area of land held in one ownership. The respondent must pay the appellant's costs of the appeal to His Majesty in Council. The costs of the previous hearing in the High Court and of any further hearing will be dealt with by the High Court.

Solicitors for appellant: *Douglas, Grant and Dold.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Krishnama Naicken and another .. *Appellants** (*Prisoners —1st and 2nd Accused*).

In re Krishnama Naicken.

Indian Evidence Act (I of 1872), S. 32—Dying declaration recorded—Neither read over to the deceased nor signed by him—Prosecution witness speaking to it—Not able to reproduce the exact words said by the deponent—Whether such a document admissible under S. 32.

Where a dying declaration was written by the Sub-Assistant Surgeon and was not read over to the deceased after it had been so written and did not bear the signature of the deceased and the witness speaking to it refreshed his memory from it, but did not reproduce from recollection the words used by the deceased,

Held, that the document was correctly admitted in evidence in the Lower Court as a record of the deceased's statement produced by the prosecution witness from which he refreshed his memory.

Their Lordships guard themselves from saying that when a dying declaration has been recorded and has been read over to deponent and agreed to be correct it can be put in by itself and treated as substantive evidence without calling the person who recorded it, as they are of the opinion that the evidence of the person who recorded it or in his unavoidable absence some other person who was present and heard it correctly recorded should always be taken to make the written record admissible.

In re *Samiruddin*, (1881) I.L.R. 8 Cal. 211 and *King-Emperor* v *Mathura Thakur*, (1901) 6 C.W.N. 72, dissented from.

Emperor v. *Balaram Das*, (1921) I.L.R. 49 Cal. 358 at 363, referred to.

Having regard to the time that elapsed between the recording of the statement and the giving of evidence, the prosecution witness could not be expected to reproduce accurately the words of the deceased and he was entitled therefore to put in the document as a correct record of what the deponent said at the time.

Partap Singh v. *Crown*, (1925) I.L.R. 7 Lah. 91, followed.

Trial referred by the Additional Sessions Judge of the Coimbatore Division for confirmation of the sentence of death passed upon the said Prisoner (1st accused) in Case No. 65 of the Calendar for 1930 on the file of the Court of Session of the Coimbatore Division and Appeal by the 1st and 2nd accused against the order (of the Court) of the Additional Sessions Judge of the Coimbatore Division in the said case No. 65 of the Calendar for 1930 on the file of the Court of Session of the Coimbatore Division.

George Joseph for appellants.

The Acting Public Prosecutor on behalf of the Crown.

The judgment of the Court was delivered by

Beasley, C. J.

The Chief Justice.—The two appellants, the 1st and the 2nd accused in the Court below, were charged with

*Referred Trial No. 88 of 1930 and Cr. Appeal No. 349 of 1930. — 2nd October, 1930.

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the murder of Krishnama Naicken early in the morning of the 2nd April, 1930, at a place called Peedampalli. They were both convicted of the offence and the 1st appellant was sentenced to death and the 2nd appellant to transportation for life.

[After narrating the facts of the case their Lordships proceeded]

Reference has been made to the statement of the deceased recorded by the Sub-Assistant Surgeon, P.W. 1. That is Ex. B. It is very brief and is as follows:—

"One Krishnama Naicken, son of Velappa Naicken of Peedampalli assisted by his brother-in-law, assaulted me with *koduval*, stick, etc., this early morning at about 4-30 A.M. I was decoyed by accused Krishnama Naicken's wife on plea of helping her from being brutally assaulted by her husband. I, believing this to be true, went to a pallam near Nilama Naicken's garden. The accused's brother-in-law caught hold of my tuft and the accused cut me with a *koduval* on my head I fell down and both assaulted me with *koduval* and stick. I cried out and then the neighbours came and took me to this dispensary. There was no one else present at the time I was assaulted, except the above three persons."

To P.Ws. 2, 3, 5, 8 and 13 the deceased stated that he was attacked by the 1st accused, that he beat the 1st accused with his stick and that the 2nd accused wrested the stick from him and beat him. In Ex. B he does not mention that he beat 1st accused with his stick. Ex. B was not read over to the deceased nor does it bear his signature. In the Sessions Court objection was taken to the admissibility of Ex. B. P.W. 1 had stated that he questioned the deceased in Tamil and recorded the statement in English whereupon objection was taken by the pleaders for the appellants. Ex. B was, however, admitted and the learned Sessions Judge has made a note that the accused's pleaders were offered the opportunity of testing the witness in Tamil by reading him a short piece of Tamil but they declined the offer. Ex. B is attested by P.W. 1's compounder who was present throughout the whole of the declaration. In his judgment the learned Sessions Judge in dealing with Ex. B states that "it has been attacked but I see no reason to doubt its genuineness." That is the only reference he makes to that document on the question of its admissibility. It appears therefore that the only objection taken to the document by the appellants' pleaders was that it was not a correct record of what the deceased stated. Here, however, Mr. Joseph has contended that Ex. B is inadmissible. His argument is that as it was not actually written by the deceased but was written by somebody else and was not read over to him after it had been so written and does not bear the signature of the deceased, it is not a written statement within the provisions of section 32 of the Indian Evidence Act and is, therefore, inadmissible as a written

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statement of the deceased. He agrees that if such a statement is read over to the deceased and agreed to be correct or is signed by the deceased, then there can be no question about its admissibility in evidence provided the person who wrote it is put in the witness box to state that he wrote it. He relies on what P.W. 1 stated in the Sessions Court, namely, "As I found his condition to be bad I took a dying declaration from the deceased at 10-30 P.M. and I recorded correctly what he told me. It is Ex. B. I did not take his signature as his right arm was fractured." His contention is that this is not being the written statement of the deceased or recorded by some one else in compliance with the necessary formalities, the only evidence of what the deceased said can be that of witnesses who state from memory what it was they heard the deceased say. He agrees that those witnesses can be allowed to refresh their memories by reference to any writing made by themselves at the time of the transaction —that is provided for by section 159 of the Evidence Act— and he contends that that is not what P.W. 1 did in this case and that he did not state anything from memory but merely put in Ex. B. Mr. Joseph agrees that he would not be able to take any exception to the evidence of P.W. 1 if that witness had said that he did not remember the actual words of the deceased and had been allowed by the Court to refresh his memory. His objection of course is purely technical and it is obvious that witnesses who depose to something they heard an injured man say with regard to those injuries shortly before death purely from recollection, are not likely to be so accurate as a record made of the statement at the time. The evidence which is likely to be less accurate is clearly admissible but when evidence which is more likely to be accurate is tendered, according to Mr. Joseph, it is inadmissible. He has referred to some cases which according to him support his argument and render Ex. B inadmissible. One of these is *The Empress* v. *Samiruddin*[1]. There it was decided that the dying statement of a deceased person must be taken in the presence of the accused, that if not so taken the writing cannot be admitted to prove the statement made and that the statement may be proved in the ordinary way by a person who heard it and the writing may be used for the purpose of refreshing the witness's memory. On page 213 the matter is thus dealt with in the judgment of Pontifix and Field, JJ.:

"The piece of evidence to which this observation relates is the dying statement of the deceased Baber Ali This was recorded by the Deputy

1. (1881) I.L.R. 8 C. 211.

Magistrate as a 'deposition'; but it does not appear that Baber Ali was examined in the presence of the accused Samiruddin, and unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made."

This is relied upon by Mr. Joseph as an authority in his favour because he argues that P.W. 1 did not use the writing to refresh his memory but merely put it in without any attempt to refresh his memory or without having attempted to reproduce from his own recollection the words used by the deceased. Another case referred to by him is *Kunj Lal* v. *Emperor*[2]. The headnote of that case is as follows:—

"Witnesses should not be allowed to prove a dying declaration as if it were a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under S. 32 of the Evidence Act and that statement is not the document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made."

But it would appear from the judgment on page 580 that the argument against the reception of the evidence of persons who heard the deceased person make a statement which was recorded in writing was a valuable criticism only but the Court held that the two witnesses to whom the statements were made by the deceased having been produced in Court and made available for cross-examination, the defect in the form in which the dying statements were taken down did not destroy their value. In that case both the Sub-Inspector and the Magistrate went into the witness-box. It is a very different thing when it is sought to put in a statement by itself without calling the person to whom it was made, to give evidence. *The Empress* v. *Samiruddin*[1] was dissented from by Spencer and Phillips, JJ., in In re *Karuppan Samban*[3] where it was held that it was not necessary in order to make a dying declaration admissible in evidence that the Magistrate who recorded it be examined as a witness in the case. In the course of the judgment it is stated:

"It is conceded that an oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by any one who heard it made, as well as by the person who recorded it. That is sufficient for the purpose of the case, as Ex. D has been proved by the Sub-Assistant Surgeon who heard the statement being

1. (1881) I.L.R. 8 C. 211. 2. (1922) 67 I.C. 577 (Lah.).
3. (1915) 31 I.C. 359.

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made and signed it. With all due deference, we are unable to follow the learned Judges who decided *The Empress* v. *Samiruddin*[1] and *King-Emperor* v. *Mathura Thakur*[4], when they say that the only way of proving such a statement is by calling a person who heard it made and permitting him to refresh his memory from the writing under section 159 of the Evidence Act. Whether they are treated as written statements of deceased persons or as written records of verbal statements, section 32 (1) allows dying declarations which have been reduced to writing to be admitted as relevant facts. They thus become substantive evidence of the circumstances leading to the deceased person's death when the cause of the death is in question. A statement taken in the absence of the accused from a witness for the prosecution is described as a 'deposition' in section 512, Criminal Procedure Code, but sections 157 and 158 of the Evidence Act show that, if it satisfies the conditions of section 32, it is nevertheless a 'statement' and as such is relevant whether the absence of the witness is caused by his death or by some other cause which makes him incapable of giving evidence in person."

Mr. Ganapathi, the learned Acting Public Prosecutor, contends that whether the statement recorded is read over or not or whether it is signed makes no difference and that the fact that it has been read over and signed by the deponent only makes its evidentiary value stronger and with this contention we entirely agree. We are referred by Mr. Ganapathi to *Emperor* v. *Balaram Das*[5] where it is stated:

"An objection has been taken that as the Assistant Surgeon neither himself recorded the statement nor read it at the time when it was made, he could not refresh his memory by reference to that statement under section 159 of the Evidence Act. But we hold that the evidence that the deceased used the words contained in the statement given by the witness who can speak to these words by refreshing his memory is not the only way in which the statement of the deceased person can be proved. If the witness who heard that statement made swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. Here the important part of the evidence is that the dying declaration was recorded in the presence of a witness, that it was read over to the deceased in the presence of the witness and was admitted by the deceased to be correct. This we think is sufficient. Our view is supported by the case of *Gouridas Namasudra* v. *Emperor*[6]. There the written petition of complaint which contained the statement made by the deceased person as to the cause of his death, was admitted in evidence on being proved by the mukhtear's mohurrir, who had prepared it under personal instructions, and who deposed that the deceased made the statement to him which was correctly recorded in the petition."

The case of *Gouridas Namasudra* v. *Emperor*[6] was not dissented from in this judgment because in the opinion of the Court the evidence of the Assistant Surgeon fulfilled the test laid down in that case. This case decides that anybody who has heard the deceased make a statement which has been recorded can give evidence of it either by refreshing his memory or from recollection without it. This, however, does not quite meet the point of Mr. Joseph whose contention is that P.W. 1

1. (1881) I.L.R. 8 C. 211.
4. (1901) 6 C.W.N. 72.
5. (1921) I.L.R. 49 C. 358 at 363.
6. (1908) I.L.R. 36 C. 659.

neither refreshed his memory nor attempted from recollection to reproduce the words used by the deceased. But upon this point *Partap Singh* v. *The Crown*[7] is against him. In that case a head constable produced a document which purported to be the record of a statement made by a dying person and stated that he had recorded the statement correctly as contained in the document and that the deceased was in his senses at the time but did not repeat in his own words what the deceased had said; and it was held that inasmuch as the surrounding circumstances, and more especially the length of the period which intervened between the recording of the statement and the trial of the case, rendered it impossible for the constable to recollect and repeat the words used, his statement should be treated as if he had prefaced it by stating categorically that he could not remember what the deceased had said and that section 160 of the Evidence Act applies when the witness states in so many words that he does not recollect, and when the circumstances establish beyond doubt that this is so and that having no specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time. It is not clear whether in this case the statement made by the deceased was read over to the deceased or not but in our view that does not affect the question of the admissibility of the document. On page 96 in the judgment it is stated as follows:

"In sections 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence, and the witness merely gives evidence in the ordinary way after reading what has been written. Section 160 deals with the case where in spite of having written or read a document under the circumstances described in section 159 the witness has got no specific recollection of the facts therein recorded, but is sure that they were correctly recorded. Where this is the case the witness is still entitled to testify to the facts and the document itself is then tendered in evidence."

Further on it is stated:

"Section 160 of the Evidence Act applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify to the effect that he recorded correctly what the deponent said at the time."

We think that as the statement was recorded in April and the evidence was not given by P.W. 1 at the Sessions trial until July, P.W. 1 cannot be expected accurately to reproduce

7 (1925) I.L.R. 7 Lah. 91.

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the words of the deceased and that he was entitled therefore to put in Ex. B as a correct record of what the deponent said at the time. We guard ourselves from saying that when a dying declaration has been recorded and has been read over to the deponent and agreed to be correct it can be put in by itself and treated as substantive evidence without calling the person who recorded it, as we are of the opinion that the evidence of the person who recorded it or in his unavoidable absence some other person who was present and heard it correctly recorded should always be taken to make the written record admissible. Ex. B was therefore correctly admitted in evidence in the Lower Court as a record of the statement made by the deceased by P.W. 1 from which P.W. 1 refreshed his memory. The evidence of P.Ws. 2 and 3 corroborates the statement made by the deceased to P.W. 1.

[Their Lordships then discussed the evidence and said]

We agree with the learned Sessions Judge that the evidence proves that both the appellants are guilty of the murder of Krishnama Naicken; and their convictions in the Lower Court of that offence must be confirmed. We also confirm the sentence of death passed upon the 1st appellant and the sentence of transportation for life passed upon the 2nd appellant. The appeal is dismissed.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice* AND MR. JUSTICE CURGENVEN.

N. M. Venkatarama Aiyar .. *Appellant** (*Petitioner*)

v.

The Collector of Tanjore .. *Respondent* (*Respondent*).

Venkatarama Aiyar v. Collector of Tanjore.

Land Acquisition Act (I of 1894), Ss. 9, sub-ss (2) and (3), 25 (1) and (2)—Personal notice—Fifteen days' time, if necessary.

The words "to the same effect" in section 9, sub-section (3) of the Land Acquisition Act mean that the personal notice should afford the occupier of land, the same interval of fifteen days for stating the particulars of his claim for compensation, as is provided for in the case of a public notice under sub-section (2).

A notice fixing a shorter term is in contravention of the statute and consequently defective and the stringent provisions of S. 25 (2) of the Act cannot be applied to the omission of the occupier to make his claim after such a defective notice.

Krishna Sah v. *The Collector of Bareilly*, (1917) I.L.R. 39 A. 534 and *The Collector of Chingleput* v. *Khadir Mohideen*, (1926) 50 M.L.J. 566, followed.

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*Appeal No. 361 of 1928. 5th February, 1930.

Venkatarama Aiyar v. Collector of Tanjore.

Birbal v *The Collector of Moradabad*, (1926) I.L.R. 49 A 145, not followed

Appeal against the order of the Court of the Subordinate Judge of Tiruvarur, dated 19th December, 1927 and made in Land Acquisition Original Petition No. 16 of 1926.

T. Rangachariar and *R. Seturama Sastri* for appellant.

The Government Pleader (*P. Venkataramana Row*) for respondent.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *Beasley, C. J.*—The petitioner's lands in Naduvacheri village were acquired to the extent of 47 cents in accordance with the scheme sanctioned in G.O. No. 3559, Revenue, dated the 10th November, 1917. The award of the Land Acquisition Officer is dated the 17th November, 1925. After the award was made, the petitioner put in an application on the 22nd December, 1925, under section 18 of the Land Acquisition Act (I of 1894) requiring the matter to be referred to the Subordinate Court on the ground that there had been a gross undervaluation of the properties acquired. Under section 25 (2) of the Act when an applicant has omitted without sufficient reason to make a claim, the amount awarded by the Court, *i. e.*, the Subordinate Court, shall in no case exceed the amount awarded by the Collector. The learned Subordinate Judge held that the appellant had omitted to make a claim under the Act and that such omission was without sufficient reason. Upon that finding he could not under the Act award an amount in excess of the amount awarded by the Collector but nevertheless he proceeded to deal with the case on its merits.

Two preliminary questions have to be decided here before the case can be considered on its merits. The first point is whether the notice issued by the Collector under section 9 of that Act complies with the provisions of sub-sections (2) and (3) of that section, as it is contended on behalf of the appellant that the notice did not call upon him to make a claim for compensation. The second point is that the notice does not comply with the provisions of those sub-sections because the notice served upon the appellant was served upon him only on the 17th October, 1925, whereas he was called upon to appear before the Collector, in this case, the Labour Officer, on the 26th October and hence he was only given nine days' notice and it is contended that he was entitled to not less than fifteen days' notice after the date of the publication of the notice.

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With regard to the first point, the personal notice to the appellant is Ex. N. It is a notice issued under sections 9 (3) and 10 of the Land Acquisition Act and it states as follows:—

"The Government are going to acquire the lands mentioned in the list hereunder under Act I (India) of 1894. You shall appear either in person on the 26th October, 1925, before me at Nannilam Camp or by an authorised agent and inform the nature of the right you possess in these lands, the amount due to you out of the amount of compensation to be given for the said right, and objections if any in respect of the measurements made according to section 8 You should prepare a written statement and the same signed either by you or by your authorised agent should be presented."

The notice then goes on to call for the particulars required under section 10 of the Act. It is contended by Mr. Rangachariar that this notice does not call upon the appellant to put in his claim. Section 9 (2) of the Act says:

"Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice) and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interest, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent."

Sub-section (3) states:

"The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf within the revenue district in which the land is situate."

The notice under sub-section (2) is the public notice and that under sub-section (3), the personal notice. Ex. N is the personal notice and it is to be observed that it is to be to the same effect as the notice in sub-section (2). The particulars of the land so needed were set out in the list sent with that notice and in it the applicant was told to appear either personally or by an authorised agent on a date mentioned, namely, the 26th October and at a place mentioned, namely, the Nannilam Camp and to state the nature of the right he possessed in the land, the amount of compensation to be given for such right and objections, if any, to the measurements made under section 8. He was further required to prepare a written statement and sign it and present it. Mr. Rangachariar contends that this notice does not call upon the appellant to state his claim to compensation because he is merely called upon to inform the nature of the right he possesses in the land and the amount due to him out of the amount of compensation to be

given for the said right. He contends that this is not the same thing as calling upon him to state the amount and the particulars of his claim to compensation for his interest in the land. It seems to me that such an argument is wholly untenable. No other construction can be put upon Ex. N except that it is a notice calling upon the appellant to claim an amount of compensation due to him for such interest as he possesses in the land under acquisition. In my view, the notice in this respect clearly is in accordance with the provisions of section 9 and I cannot for one moment credit the statement that it is ambiguous and likely to be misunderstood by the appellant. This contention therefore fails.

On the second point what has to be considered is whether it is necessary for the Collector to give at least fifteen days' notice from the service of the notice to the date of the appearance of an applicant before him, for admittedly Ex. N gave only nine days' notice; and if fifteen days' notice is requisite, then it is contended by Mr. Rangachariar on behalf of the appellant that the omission to give that notice must be held to be a sufficient reason for the omission of the appellant to make a claim. It is conceded by Mr. Rangachariar that he did not make the claim required by the Act. It is quite clear that the Act requires a claimant to state the amount of compensation he is claiming; and on page 1 of the pleadings there is the statement of the appellant made to the Labour Officer on the 26th October, 1925, and there he said that he received a notice directing him to submit his objections, that no one had any right over his lands under acquisition by way of mortgage, that he had not got any sale-deed to show the price of land in the village and that he could not state the value of the land. This statement was made by him in answer to questions put to him by the Labour Officer. He, therefore, clearly did not make such a claim as is required by the Act. But Mr. Rangachariar contends that the personal notice under section 9 (3) of the Act makes it requisite that an applicant should have at least fifteen days' notice. The sub-section does not state that he must have such a notice but it is argued that as it is provided that the notice must be to the same effect as in section 9 (2), all the conditions of the latter notice apply to the notice under subsection (3). On the other side, the learned Government Pleader argues that fifteen days' notice is not necessary in the case of the notice under section 9 (3) of the Act, because the notice thereunder is merely to be to the same effect as the notice under sub-section (2) and that the notice under the

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latter sub-section, although it must give an interval of at least fifteen days, does not state in the body of it that the interval is one of at least that time. That, of course, is quite true because the notice merely states the date and the time of the appearance of the applicant. He argues that it is only necessary that there should be an interval of fifteen days from the date of publication of the notice under section 9, sub-sections (1) and (2) and, if that notice has been given, then it does not matter if the notice under sub-section (3) gives a shorter time to the appellant. But if it is important for the applicant in the public notice to have fifteen days' notice at least, it is difficult to see why he should have any shorter notice in the notice served upon him personally. On the contrary, it appears to be more important that he should have the requisite notice in the personal notice than in the public notice. The latter he may never see and therefore the former may be the only notice he receives calling upon him to make his claim. For example, there are cases which must by no means be uncommon where the applicant either lives in another place or has gone away on business to another place. If such a person has to reply merely on the public notice, he may receive no notice at all. On the other hand, the personal notice does or ought to reach him wherever he may be, and it seems to me obvious that in such cases he must have sufficient time in which to prepare his claim. Section 9 (2) by providing for a notice of at least fifteen days makes that a reasonable notice and I cannot see why in the case of the personal notice the applicant should not be entitled to an equally reasonable notice. The learned Government Pleader argues that, in the case of which I have given an example, it might be a ground for holding that the applicant had sufficient reason for omitting to make a claim, but the intention of the Act is to get persons to come forward with their claims and not to enable them to be absent and make no claim and thereafter be excused. It seems to me that the spirit of the Act is that a person should have a reasonable notice served upon him in order to give him time to formulate his claim. The importance of the fifteen days' notice was considered in *Krishna Sah* v. *The Collector of Bareilly*[1], where it was held that, under section 9 (3) of the Act, the occupier of land concerning which a public notice has been given under sub-section (1) of the section is entitled to such notice as will give him, in the same manner as the person mentioned in sub-section (2).

1. (1917) I.L.R. 39 A. 534.

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fifteen days' interval in which to state before the Collector the nature of his interest in the land and the particulars of his claim for compensation. In that case, the publication of the notice was on the 18th July and the date required for appearance before the Collector was the 24th of July, clearly a much shorter period than that prescribed by the section. The personal notice, namely, that under sub-section (3), was served on the 16th July and that was also less than 15 days' notice. On page 535 of that case, in the judgment, it is stated:

"There is no reason why the occupier should not have the same time allowed him within which to make his objection as other persons. We think that the words 'to the same effect' in clause (3) really mean that the second notice should have the same matters mentioned in it, including the time, as the first notice."

It is not clear from this judgment whether the Court decided that the applicant in the personal notice should have at least fifteen days from the date of the public notice or whether he should have at least fifteen days from the date of the service of the personal notice upon him. But I think that it must follow that the fifteen days must be from the date when the matter is brought to his attention, because, as I have already stated, the public notice may escape the appellant's attention. This question was also considered by a Bench of this Court in *Collector of Chingleput* v. *Khadir Mohideen Sahib*[2], where it was held that where the notification under section 9 does not give the claimant the fifteen days' notice as required, it amounts to "sufficient cause" within the meaning of section 25 (3) of the Act for the claimant's omitting to make a claim and he thereby escapes the application of the stringent provisions of section 25 (2). Krishnan, J., in his judgment states:

"The objection based on section 25 (2) of the Land Acquisition Act (I of 1894) is clearly untenable Clause (1) says that the claim for compensation has to be made 'pursuant to the notice given under section 9' and this makes a proper notice a pre-requisite Now, as shown by the District Judge and by my learned brother, such a notice was not given in this case, the notices all being defective in one way or another. The claimant's omission, therefore, to make a claim before the Deputy Collector was not without 'sufficient reason' and he escapes the application of the stringent provisions of clause (2) to his case"

It must be noted that in this case, in addition to not giving the claimant fifteen days' notice, the property intended to be acquired was not clearly defined. But that does not affect this question. There is, however, a later decision of the Allahabad High Court, *Birbal* v. *The Collector of Moradabad*[3], in which

2. (1926) 50 M.L.J 566 3 (1926) I.L.R. 49 A 145.

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a view contrary to that taken by the same Court in *Krishna Sah* v. *The Collector of Bareilly*[1] was taken. There it was held that the rule requiring an interval of fifteen days between the issue of the public notice provided for by clause (2) and the hearing of claims by the Collector does not apply to the personal notice issued under clause (3). *Krishna Sah* v. *The Collector of Bareilly*[1] does not appear to have been brought to the notice of the Court and there is no reference to it whatever in the judgment and I am not inclined to accept this case as accurately deciding this question. In *Rameswar Singh* v. *Secretary of State for India*[4] there are some very valuable observations. That was a case under the Land Acquisition Act and the notice under section 9 of the Act did not contain the material facts which would enable the landowner to identify the land intended to be taken up and the notice fixed less than the prescribed time to prefer claims. It was held that these were irregularities and a suit for damages for permanent injury caused by the acquisition of the land was maintainable in the Civil Court. In dealing with the irregularity of the notice in point of time, in the judgment of the Court on page 480, it is stated that:

"Where the Statute requires that the notice should give the owner a prescribed time, after the expiry of which claims and objections might be preferred, a notice which fixes a shorter time is in contravention of the Statute, and is consequently defective. The principle is that no man shall have his rights determined without the opportunity to be heard in his defence and where the Statute prescribes the minimum period, which the person affected is to have, for submission of his defence, such time cannot be allowed to be reduced In order to give validity to the proceedings and finality to the award in which they terminate, the power of acquisition with all statutory limitations, and directions for its use, must be strictly pursued; every essential pre-requisite to the jurisdiction called for by the Statute must be strictly complied with "

In that case, the judgments of the Privy Council in *North Shore Railway Co.* v. *Pion*[5] and of the House of Lords in *Herron* v. *Rathmines*[6] were referred to. In the latter case, Lord Macnaghten observed that where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the appointment so far as it makes provision on his own behalf. I entirely agree with the views expressed by the Calcutta High

1 (1917) I.L.R. 39 A. 534.

4 (1907) I.L.R. 34 C 470

5. (1889) 14 A C. 612

6. (1892) A.C. 498.

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Court in *Rameswar Singh* v. *Secretary of State for India*[1], the Allahabad High Court in *Krishna Sah* v. *The Collector of Bareilly*[1] and this High Court in *Collector of Chingleput* v. *Khadir Mohideen Sahib*[2]. The stringent provisions of section 25 (2) of the Act can only be applied after a notice which is strictly in compliance with section 9, sub-sections (2) and (3) has been served upon the landowner.

A further point arises however and that is whether the appellant by appearing before the Labour Officer, notwithstanding the fact that he had not received the requisite notice, must be held to have waived that requirement. The learned Government Pleader contends that he has done so and that this is merely a technical objection which ought, under the circumstances, to be brushed aside. In my view, it lies upon the Government Pleader to show that the waiver has been clearly established. It is not sufficient to show that the appellant appeared before the Labour Officer and answered certain questions that were put to him. It has not been shown that the appellant knew that he was entitled to at least fifteen days' notice; nor has it been shown that, if he had known that he was, he would not have asked for an adjournment and there is nothing to show that there has been any waiver by the appellant. The learned Government Pleader further argues that this objection is a mere afterthought and that it was never put forward until the argument was addressed to the Lower Court at the close of the case. But, in my opinion, this cannot affect the value of the objection. It was argued by Government in the Lower Court that the appellant was shut out from any enhancement of the Labour Officer's award by reason of his omission to make a claim. When that objection to the appellant's claim in the Lower Court was urged, it was open in my opinion to the appellant to raise the point that the notice served upon him was defective in any respect even though that point had not been raised before. The appellant was therefore entitled to have the case considered on its merits.

On the merits, the award gives Rs. 6 per cent for the land in the cheri, with the exception of one item where the rate allowed is Rs. 9 per cent and 9 per cent for the 17 cents in the Sudra quarters It is worthy of note that the appellant claims Rs. 60 per cent. It seems to me to be impossible in this case to fix the actual value of the lands and all we can do is to

1. (1917) I.L.R. 39 A 534. 2. (1926) 50 M.L.J. 566.
4. (1907) I.L.R. 34 C. 470.

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make a rough estimate which may indeed be very rough. But it seems to me that however long we may devote to this case and however much we may read through the evidence of the witnesses and the exhibits, we shall not be better off in arriving at a conclusion. Our difficulties are increased by reason of the fact that there have been no sales of house-sites in this village at all since the year 1915, *i.e.*, 10 years before the date of the notification. On the other hand there is evidence in support of the appellant's case of certain sales in neighbouring hamlets none of them more than four furlongs away and some of them even less. Those sales are evidenced by Ex. J., dated the 13th July, 1920, giving a rate of Rs. 47 per cent., Ex. K, dated the 24th August, 1921, giving a rate of Rs. 12 per cent, Ex. L, dated the 11th December, 1922, giving a rate of Rs. 28 per cent, Ex. M, dated the 29th November, 1924, giving a rate of Rs. 37 per cent and Ex. O, dated the 4th August, 1927, giving a rate of Rs. 50 per cent. The latter sale can be ruled out of consideration altogether because it was two years after the date of the notification. The areas disposed of by these sales are in the case of Ex. J 4¼ cents, Ex. L 3¼ cents—in this case these were nunja lands converted into house-sites—and Ex. M 8 cents. It will be seen that the rates realised are widely divergent, the lowest being Rs. 12 per cent and the highest Rs. 47 per cent. In the case of Ex. K it was Rs. 12 per cent possibly because it was a sale by a woman who was living away from the property; so that may have been a sale at an undervalue; on the other hand with regard to Ex. J it is said that the high rate secured, namely Rs. 47 per cent was because the property abutted on a metal road and there were shops around it. That of course would very much increase the value of the land. In the case of Ex. L it is only a very small area, namely, 3¼ cents. The learned Subordinate Judge has not taken into consideration these sale-deeds prayed in aid by the appellant because the lands are not in the same village and the rates shown are so widely divergent, and I am not disposed to disagree with him there. On the other hand we have got two sale-deeds put in by the Labour Officer, namely, Exs. II and XII. Taking the latter first, it relates to a sale of land in 1908 and it produces a rate of Rs. 7 per cent. That is land in the village in the Sudra quarters, but it was so long ago as 1908. Ex. II was ten years before the date of the notification, namely, 1915 and that was a sale of a house-site in the Sudra quarters of the village and the rate works out at Rs. 9 per cent. It is quite obvious that in the interval of ten years land must have appre-

ciated in value though it is very difficult to say how much it did; but making the very best efforts that I can arrive at a correct estimate, I think that if I say that it would have doubled in value during that time, that possibly is as near being correct as it can be. That produced a rate of Rs. 18 per cent. for the sites in the Sudra quarters, exactly double the rate given in the award. Then the rate for the sites in the cheri must be less. The rate fixed in the award for these sites is two-thirds of that for the sites in the Sudra quarters, and the appellant himself states their value is half the value of the sites in the Sudra quarters. I think that if we take the proportion given in the award, namely, two-thirds, that will be about correct. Therefore in respect of the sites in the cheri a rate of Rs. 12 per cent is the correct rate. In the result the claimant will get compensation at the rate of Rs. 18 per cent for the sites in the Sudra quarters and Rs. 12 per cent for the sites in the cheri, besides the 15 per cent. compensation due to him. With regard to damages I do not think that any case for awarding damages has been made out by the appellant and therefore he will get nothing in that respect. The claims for severance and for the value of trees were given up here in the course of the argument. The appellant is ordered to pay half the costs of the respondent. Interest is allowed on the amount awarded at 6 per cent. per annum from the date of possession, namely, the 2nd December, 1925, up to the date of payment.

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Curgenven, J.—The first contention raised in this appeal is that the learned Subordinate Judge was wrong in deciding, with reference to the terms of section 25 (2) of the Land Acquisition Act, that the applicant had omitted without sufficient reason to make a claim, with the result that the Court was precluded from awarding more to him than the sum fixed by the Collector. In support of this contention two reasons are given for the applicant's failure. The first has reference to the wording of the notice, Ex. N, issued under sub-section (3) of sections 9 and 10 of the Act. I agree that the notice clearly calls upon him to state the amount of compensation which he claims, although the language may not be a verbatim transcript from section 9 (2), and that there is no substance in this objection. The second point taken is that, whereas the latter provision prescribes an interval of 15 days, the applicant was given only 9 days from the 17th October, when the notice was served upon him, to the 26th October when he was required to

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appear to make his claim. The learned Government Pleader takes up the position that whereas a 15 days' interval, reckoned from the date of publication, is prescribed for the public notice under sub-section (2) of section 9, no such condition attaches to a notice issued under sub-section (3) to the owner or occupier of the land. I think that this view must be rejected upon a right construction of the Act. Sub-sections (1) and (2) of section 9 enumerate the various particulars which a public notice must comprise; in particular it

"shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land," etc.

Sub-section (3) says that the Collector shall also serve notice *to the same effect* on the occupier, etc. The learned Government Pleader would have us construe this as meaning that the latter notice must be in consonance with the public notice as regards the date of appearance, but that service of the notice is not thereby required to be not less than 15 days before the date of hearing. I do not think that such a notice would be "to the same effect" as the public notice, because what the public notice in effect does is to give claimants a minimum period of 15 days within which to present their claims. It is difficult to suppose that the intention of the Act is to deprive persons who are dependent for their information of the proceedings upon a personal notice of this right, while conceding it not only in the case of the public notice but also, as a reference to the section will show, in the case of requisitions under section 10 (1). This is the view that was taken in *Krishna Sah* v. *The Collector of Bareilly*[1] and although a later Allahabad case, *Birbal* v. *The Collector of Moradabad*[3], records a decision in the opposite sense, it is noteworthy that no reference is made in it to the earlier decision of the same Court and, except for the observation that the provision in clause (2) of section 9 relating to the 15 days is not repeated in clause (3), the construction of the section is not further discussed. In *Collector of Chingleput* v *Khadir Mohideen Sahib*[2] a Bench of this Court held that a claimant must be given at least 15 days in the notice issued to him and, adopting this view, I conclude that in this respect the notice issued to the applicant was not in accordance with the terms of the Act.

1. (1917) I L.R 39 A. 534 2. (1926) 50 M.L.J. 566.
3. (1926) I.L.R. 49 A. 145.

It has then to be decided whether this defect furnished the applicant with sufficient reason to omit to make his claim The notice was served on him, as I have said, on the 17th October, and on the 26th he appeared before the Labour Officer. who was the Collector appointed for this acquisition, and made a statement which admittedly did not comprise a "claim" as that word is used in section 25. All that he said on the question of valuation was

"I have not brought any sale-deed to show the price of land in the said village. I cannot say the value of the land in my village."

In order to amount to a claim, the applicant should have assessed the value of the property in definite terms. In the two cases cited above, which held that a notice under clause (3) must give a minimum period of 15 days, the claimant failed to make any statement at all and it is not difficult to hold that such a failure is attributable to the insufficiency of the time given, and therefore that he had sufficient reason for the omission. The learned Government Pleader argues that the present case is distinguishable because the claimant did appear and made a statement, and that it cannot be said that the inadequacy of this statement as a claim is traceable to any shortness in the notice. He draws attention also to the late stage at which exception was taken on the score of insufficiency of time and argues that the point was a mere afterthought and in no way affected the applicant's interests. It is no doubt true that the defectiveness of the statement given on the 26th is not clearly traceable to the cause pleaded, but I am not satisfied that this disposes of the applicant's objection. If a person makes no claim at all and the notice issued to him is found to have offended against the 15 days' rule, he may be deemed to have had sufficient reason for the omission, and it is difficult to see why another person, similarly handicapped, who does something more towards making a claim should be penalised, unless it be by an application of the doctrine of waiver. To apply this doctrine it must I think be found that the applicant knew what his legal rights were and consented to forego them. In the present case I can find no sufficient reason to make this assumption, or to infer with certainty against the claimant that, if he had had due notice, he would not have presented a claim within the meaning of the Act. Where an officer whose duty it is to apply the provisions of an Act, such as the Land Acquisition Act, commits an error of procedure, I think that every presumption should be made in favour of the party likely to have been prejudiced by the error. This principle, in its application to the Act, will

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be found set forth and supported by the citation of a number of English and American cases in *Kamini Debi* v. *Pramatha Nath Mookerjee*[7], and although that case dealt with the matter from the point of view of jurisdiction, I think the observations are equally pertinent here where the application of section 25 is in question. Expressed in general terms, the conclusion I would reach is therefore that although it may be doubtful whether the insufficiency in the notice and the defectiveness of the statement were related as cause and effect, the presumption that this must have been so has not been successfully rebutted.

Apart from the question of insufficiency of notice, it appears to me that the applicant may be said to have had another sufficient reason for not making a claim. When he appeared, the Labour Officer took an oral statement from him which, had it comprised the necessary particulars, would have amounted to making a claim. It may be taken, I presume, that the Labour Officer knew what those particulars should be, and in particular that they should have included the applicant's own valuation of his property. The Officer must be taken to have known also the penalty to which the applicant subjected himself by not furnishing this information. Did he explain to the applicant that it was necessary that he should put a price on his land and the consequences to him of the failure to do so? If not, may it not be said that he allowed the applicant to go away in the belief that he had complied with the requirements of the Act, and that the adoption of such a course provided the applicant with sufficient reason for not having complied with them? On this ground too I think the applicant should not be precluded by the terms of section 25 (2) from questioning the Labour Officer's valuation.

There is finally another consideration, not adverted to in the arguments but which seems to me a valid objection to the application of section 25 (2). The claim contemplated in each of the three sub-sections of that section is to be "pursuant to any notice given under section 9," and where as here the notice issued is in some respect in contravention of the terms of section 9, I think the only logical conclusion is that the penalty which section 25 (2) imposes cannot be taken advantage of by the Government.

Turning to the merits, the great scarcity of recent sales in Naduvacheri renders anything like an estimate of the market value of the acquired plots, based upon adequate evidence, ex-

7 (1911) I.L.R. 39 C 33 at 47.

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tremely difficult. It seems clear, however, that the award based on the two rates of Rs. 9 and Rs. 6 per cent. is too low. After due consideration of the prices indicated by the applicant's documents, Exs. H-1, I, K, L and M and by Exs. XII and II filed on behalf of Government, I agree with my Lord for the reasons which he gives, that the rates should be raised to Rs. 18 and Rs. 12. The applicant's documents, no doubt would yield rather higher average figures than these; but inasmuch as the Karnam's sale-deed Ex. XII, relating to the Sudra quarters, gives a rate of about Rs. 7 per cent in 1908 and as Ex. II, a sale-deed of 1915, gives a rate of Rs. 9, it is improbable that a rate of Rs. 18 for the Sudra house-sites—allowing for the doubling of the value of the land in 10 years—is too low. On the other hand, the applicant's documents do not suggest that the figure should be reduced below this. And fixing the figure for the cheri sites at two-thirds of this, as has been done by the Land Acquisition Officer and accepted by the Lower Court, we get a rate of Rs. 12 per cent, these rates to include all claims, except of course the 15 per cent. allowance for compulsory acquisition.

I agree with the order as to costs.

S.R. *Appeal allowed in part.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD MACMILLAN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

Seth Nanhelal and another .. *Appellants**

v.

Umrao Singh and another .. *Respondents.*

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Civil Procedure Code (V of 1908), O 21, Rr 2, 89, 90, 92—Sale in execution—Setting aside of—Adjustment of decree between decree-holder and judgment-debtor subsequent to sale—Intervention of third party interest—Effect of—Duty of Court to confirm sale—Fragmentary decisions of Appellate Courts deprecated.

O. 21, R 2 which provides for certification of an adjustment out of Court contemplates a stage in the execution proceedings when the question lies only between the judgment-debtor and the decree-holder. After a sale has been duly carried out in execution, the interests of a third party, namely, the auction-purchaser, intervene, which cannot be disregarded

Accordingly, once a sale has been duly effected, it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court. The

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only means by which the sale can be avoided are those embodied in R. 89, viz., an application preferred within 30 days of the sale, accompanied by a deposit in Court, for payment to the decree-holder, of the amount for the recovery of which the property was sold, together with 5 per cent. of the purchase money, for payment to the auction-purchaser as statutory compensation Where no such application is made within the time limited, it is obligatory on the Court, under R. 92, to pass an order confirming the sale, notwithstanding the circumstance that the decree-holder had admitted satisfaction of the decree

Nilkanth v. *Yeshwant*, (1920) 18 Nag. L.R. 134, overruled.

Bibi Sharofan v *Mahomed Habibuddin*, (1911) 15 C W N. 685, approved.

When several questions are raised by the memorandum of appeal, the Court of Appeal should not, ordinarily, dispose of the appeal by dealing only with one of them, leaving the other questions at issue between the parties undecided Fragmentary decisions of this character are most inconvenient and tend to delay the administration of justice.

Judgment of the Judicial Commissioner, Central Provinces, reversed.

Appeal No. 94 of 1929, by special leave, from an order, dated the 17th December, 1926, of the Court of the Judicial Commissioner, Central Provinces, which affirmed a judgment and order, dated the 15th April, 1925, of the District Judge of Hoshangabad, who had reversed a judgment and order, dated the 19th January, 1925, of the Subordinate Judge of Hoshangabad. The first Court, in effect, confirmed a sale held in execution of a decree at which the appellants had purchased the property, but the District Judge and the learned Judicial Commissioner set aside the sale, following the decision reported in *Nilkanth* v. *Yeshwant*[1].

The material facts of the case are set out in their Lordships' judgment. The main question for determination on the present appeal turned on the sixth issue framed by the 1st Court, namely, "Has the Court no jurisdiction to confirm the sale in view of the fact that the decree-holder has admitted satisfaction of the decree?" The Subordinate Judge recorded his finding on the sixth issue in the following words:—

"The ruling in *Nilkanth* v *Yeshwant*[1] is based upon the ruling reported in *Khushalchand* v *Nandram*[2]. The facts of the case in *Nilkanth* v. *Yeshwant*[1] and that of *Khushalchand* v. *Nandram*[2] are quite different. In the latter case it is not the same decree-holder who was deferred from pursuing his remedy and who also previously compromised With great respect I should think that the ruling in *Nilkanth* v. *Yeshwant*[1] would not have been what it is had the case *Bibi Sharofan* v *Mahomed Habibuddin*[3] been cited in the High Court. I would therefore most respectfully follow the latter case in preference to the former, for I feel confident that the ruling in *Nilkanth* v. *Yeshwant*[1] would be reconsidered by our High Court."

1. (1920) 18 Nag. L.R. 134. 2. (1911) 13 Bom. L.R. 977.
3. (1911) 15 C.W.N. 685.

On appeal, the District Judge differed from the Subordinate Judge, concluding his judgment in the following words:—

"The only point to consider is whether in spite of the satisfaction of the decree in shape of execution of a fresh mortgage-deed certified to the Court, the Court below had jurisdiction to proceed further with the execution of the decree. In my opinion, following the ruling of our High Court in *Nilkanth* v. *Yeshwant*[1], it had not. Consequently it should be ordered that the satisfaction of the decree by execution of a fresh mortgage deed in favour of the Society be recorded as certified and the proceedings relating to execution fall to ground absolutely. The sale held in pursuance of these proceedings will also be set aside."

The District Judge therefore made an order setting aside the sale in question and being aggrieved by that order the appellants made an application for revision of the said order to the Court of the Judicial Commissioner, and the application was heard by Mr. D. G. Mitchell, A.J.C., who delivered judgment on the 26th August, 1926. He took the view that the decision of the Subordinate Judge was right and that of the District Judge erroneous, observing as follows:—

"Rule 89 is a special provision whereby the judgment-debtor and other persons with an interest in the property may satisfy the decree after sale has been held and before it is confirmed, and this rule should be taken as modifying the generalized provisions of Rr 1 and 2. It is no longer sufficient for the judgment-debtor to make a payment to the decree holder in satisfaction of the debt and then to come with the plea that the decree is extinguished He must come into Court and make a payment in full of the decretal amount to satisfy the decree-holder's claims, and also a payment of five per cent. more to satisfy the reasonable claims for compensation of the auction-purchaser. If he fails to do so, the adjustment is not one which the executing Court can recognize. This view is borne out by the mandatory form in which R 92 has been framed Apart from the reference to Rr 90 and 91, which do not enter into this discussion, R. 92 requires that where no application has been made under R 89 or where such application has been made and disallowed, the Court shall make an order confirming the sale

"This view may be further justified on general grounds. R 89 was devised chiefly to provide for reasonable compensation to a disappointed purchaser who has deposited a considerable sum of money, but also to provide that this compensation shall be assessed, collected and paid to him with a minimum of trouble and risk. If it is held that a private adjustment between the creditor and the debtor can be recognized by the Court at this stage of the proceedings, the safeguards of R. 89 disappear, and the purchaser is left to get his compensation by the troublesome and expensive method of a civil suit Such was surely not the intention of the legislature when it devised this special procedure"

The learned Additional Judicial Commissioner, Mr. Mitchell, did not, however, actually decide the point, as he was of opinion that it ought to be decided finally by a Full Bench, and he made a suggestion to that effect. The matter was referred to a Bench of three Judges, but as the same point arose for consideration in another case, *Maroti* v. *Vithoba*,[4] the reference to the Full Bench

1 (1920) 18 Nag. L.R 134.

4 (1926) 100 I.C. 565.

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was revoked. A Divisional Bench composed of Findlay, J.C. and Prideaux, A.J.C., heard the said case of *Maroti* v. *Vithoba*[4] and delivered judgment on the 29th November, 1926, observing as follows:—

"So far as the present case is concerned we do not find it necessary to consider at length whether the rule laid down by Kotwal, A J C., in *Nilkanth* v *Yeshwant*[1] is too widely expressed or not."

The appellant's revisional application then came to be heard by Kotwal, A.J.C., who dismissed it on the 17th December, 1926, by an order in the following terms:—

"The hearing of this case was adjourned pending decision of Civil Revision No 252 of 1925 by the Bench The facts of this case which are stated in the proposed reference to a Bench by my predecessor are for all material purposes similar to those in Civil Revision No 252 of 1925 The decision of the Bench is against the applicant's contention The application is therefore dismissed with costs"

The appellants thereupon preferred the present appeal from the said order of the Additional Judicial Commissioner by special leave of His Majesty in Council.

Dunne, K.C. and *Dube* for appellants.

Respondents, *ex parte*.

16th December, 1930. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—This is an appeal by special leave. It raises an interesting question as to execution proceedings which seems to be of not infrequent occurrence. Differing opinions have been expressed in India, particularly in the Court from which the appeal comes, and the matter calls for an authoritative decision. Under these circumstances it is a matter of regret to their Lordships that the respondents have not been represented before them.

The proceedings in question commenced with an award by the Registrar of Co-operative Societies, Central Provinces and Berar. By this award, the respondents were ordered to pay to the Manegaon Society a sum of Rs. 2109-2-0 with interest, and in default, certain immovable property of the respondents, which had been mortgaged to the Society, and which was described as Patti No 2, half share of Mauza Bagada (or Bagra) Manegaon in the Hoshangabad District, was ordered to be sold. By virtue of rules made by the Local Government under the Co-operative Societies Act (II of 1912), the award was enforceable in the same manner as the decree of a Civil Court. The money not having been paid, execution proceedings were taken by the Society as decree-holders and after the usual

1 (1920) 18 Nag L.R. 134

4. (1926) 100 I.C. 565.

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formalities, the property was, on the 15th September, 1923, put up to auction and knocked down to the appellants at the price of Rs. 7,100, of which the prescribed 25 per cent. was paid at the time of the sale.

On the 24th September, before the sale was confirmed, the respondents, the judgment-debtors, put in what may be called the usual application to set aside the sale on the ground of fraud and irregularity in the conduct of the sale.

The law relating to such applications is contained in O. 21, Rr. 89—92, which are in the following terms:—

[Rules 89—92 of O. 21 were set out *seriatim*.]

On this application, issues were framed by the Subordinate Judge of Hoshangabad and the matter proceeded to trial, the confirmation of the sale standing over to await the result.

On the 28th June, 1924, when there appeared to be some chance of the proceedings coming to an end, the company[1] came forward with another application, alleging that the judgment debt had been adjusted as between them and the respondents who had executed a mortgage in their favour on the 10th May, 1924, to cover the outstanding amount of the debt, and that in consideration thereof, they (the society) had agreed to accept payment by instalments. It was accordingly prayed that the adjustment might be recorded and certified, and that the Manegaon property which had been sold to the appellants might be released.

New issues were framed on this application and incorporated in the existing inquiry, which was prolonged till the 19th January, 1925, when the Subordinate Judge delivered a combined judgment on the two applications. On the first, he held in effect that no case of fraud had been made out, and that though certain irregularities had been established with regard to the sale, they had not resulted in substantial injury to the respondents. He therefore thought that the sale could not be set aside and he accordingly rejected the respondents' application. Upon this finding, the Judge was bound by R. 92 of the order above quoted to confirm the sale, which thereupon would become absolute, subject, of course, to any variation on appeal. No such order, however, was in fact made.

The issues framed on the Society's application raised questions as to the *bona fides* of the new mortgage, on which the Subordinate Judge held that it was collusive and fraudulent, and entered into with the purpose of defeating the rights of

1. i.e., the decree-holders, the Manegaon Society.

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the appellants as purchasers. Issues 6 and 9, which have given rise to the present appeal, were as follows:—

6. Has the Court no jurisdiction to confirm the sale in view of the fact that the decree-holder has admitted satisfaction of the decree?

9. Has any interest or title accrued to the purchaser under the auction-sale, and if so, could it be defeated by a compromise arrived at in his absence?

On these issues the Subordinate Judge declined to follow the ruling of a single Judge of the Judicial Commissioner's Court (*Nilkanth* v. *Yeshwant*[2]) preferring to be guided by the opinion of the Calcutta Appeal Court in a case (*Bibi Sharofan* v. *Mahomed Habibuddin*[3]), which had not been cited in the first mentioned case. He therefore held against the Society on these issues also, and rejected their application.

The respondents appealed to the District Court against the rejection of both applications, joining as respondents the Society, the present appellants, and certain other interested persons who are not before their Lordships. The grounds set out in their memorandum of appeal covered all the issues decided under their own application in the Lower Court, and also those involved in the application of the Society. It will be sufficient to set out the 15th paragraph of the memorandum:

15. When both the judgment-debtor and decree-holder say that the decree has been satisfied out of Court, the Lower Court was bound to enter satisfaction under O. 21, R. 2. It erred in refusing to follow the ruling of our own High Court (*Nilkanth* v. *Yeshwant*[2]).

The appeal came on in due course before the District Judge of Hoshangabad, who, unfortunately, as their Lordships think, dealt only with the contention raised by paragraph 15 of the memorandum of appeal, leaving the other questions at issue between the parties undecided. He was of opinion that the contention of the respondents so raised was "obviously correct," and held that under the circumstances the Lower Court was bound to set aside the sale, and he made an order to that effect.

The appellants being dissatisfied with this determination, applied in revision to the Court of the Judicial Commissioner, asking that the order of the District Court should be set aside. Their application was heard by Mitchell, A.J.C., who delivered a well-reasoned judgment on the 26th August, 1926. He clearly thought that the case of *Nilkanth* v. *Yeshwant*[2] had been wrongly decided and he submitted the papers to the Judicial

2. (1920) 18 Nag. L.R. 134. 3. (1911) 15 C.W.N. 685.

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Commissioner for reference to a Full Bench. A reference was at first ordered, but was subsequently cancelled as the same question was already pending before a Full Bench in another case.* The final decision on the appellants' application therefore stood over to await the judgment of the Full Bench, and this having apparently been against the contentions of the present appellants, their application for revision was eventually dismissed.

It appears from the record before their Lordships that there had been considerable conflict of opinion in the Court of the Judicial Commissioner on this subject, though the only reported case is that of *Nilkanth* v. *Yeshwant*[2] in which Kotwal, A.J.C., was of opinion that an adjustment between the decree-holder and the judgment-debtor come to at any time before confirmation of an execution sale nullified the decree, taking away "the very foundation of the Court's power to execute the decree, viz., the existence of a decree capable of execution."

Their Lordships are unable to concur in this reasoning. In the first place, O. 21, R. 2, which provides for certification of an adjustment come to out of Court clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third-party interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in R. 89, viz., by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale—*see* Art. 166, Sch. I of the Limitation Act, 1908 That this is so is, in their Lordships' opinion, clear under the wording of R. 92, which provides that in such a case (*i.e.*, where the sale has been duly carried out), if no application is made under R. 89 "the Court ***shall*** make an order confirming the sale and thereupon the sale shall become absolute." Their Lordships make no reference to cases under R. 91 which has no application to the present case. They only desire to add

*The matter never came before the Full Bench, and the decision in question was given by a Bench of two Judges (Findlay, J C and Prideaux, A J C) on the 29th November, 1926 Vide *Maroti* v. *Vithoba*, (1926) 100 I C 565.

2. (1920) 18 Nag L.R. 134

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that the view they have expressed above accords with the judgment of Mitchell, A.J.C., in the present case, with that of the Calcutta Judges in *Bibi Sharofan* v. *Mahomed Habibuddin*[3], and, they think, with that of Hallifax, A.J.C., when it was under consideration in the present case whether leave should be given in India to appeal to His Majesty in Council.

Their Lordships greatly regret that the conclusion to which they have come will not finally determine the questions in dispute between the parties, in view of the fact that when the case was before the District Court in appeal, the other matters raised by the respondents under R. 90, were left open, and their consideration is therefore not competent in this appeal. Their Lordships would reiterate what has been said by the Board on many previous occasions, that fragmentary decisions of this character are most inconvenient, and tend to delay the administration of justice.

For the reasons given above their Lordships will humbly advise His Majesty that this appeal should be allowed, that the orders of the Court of the Judicial Commissioner in revision, and of the District Court in appeal should be set aside, and that the case should be referred back to the District Court for decision of the questions still standing for determination before it under O. 21, R. 90 of the Code of Civil Procedure. The respondents must pay the costs of the hearing before the District Judge in appeal and in all subsequent proceedings. All other costs in India will be dealt with by the District Judge.

The respondents will pay the costs of this appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

Respondents *ex parte*.

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Suna Pana Chena Voona Sevugan Chetty and others .. *Appellants** (*Plaintiffs*)

v.

Koovanna Kana Nana Kana Kannappa Chetty (died) and others .. *Respondents* (*Defendants*).

Sevugan Chetty v. Kannappa Chetty.

Indian Limitation Act (IX of 1908), Arts 142 and 144—Suit for possession of waste land—Title and possession till date of trespass alleged—Onus of proving possession

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*S.A. No. 1666 of 1927 9th January, 1931.

3. (1911) 15 C.W.N. 685

In a suit for possession of waste land where the plaintiffs alleged their title to the property and also specific possession till the date when the defendants trespassed upon the land,

Held, (1) that though it is true that in the case of waste land if the plaintiff proves his title to it he can prove possession by relying upon the presumption that possession follows title inasmuch as possession of waste land cannot be proved by acts of actual user, he cannot give up the case and rely upon presumption if he puts forward a case of effective possession and adduces evidence in support of it, as the plaintiffs had done in this case *Rakhal Chandra Ghose* v. *Durga Das*, (1922) 67 I.C. 673, followed,

(2) that the onus was rightly thrown by the Lower Court on the plaintiffs of proving possession of property within 12 years of the suit, and

(3) that the averments in the plaint, the issues and the evidence show that the case falls clearly under Art 142 and not under Art. 144 of the Limitation Act

Second appeal against the decree of the Court of the Subordinate Judge of Sivaganga in A.S. No. 42 of 1926 preferred against the decree of the Court of the District Munsif of Sivaganga in O.S. No. 223 of 1925 (O.S. No 34 of 1925. Additional District Munsif's Court, Sivaganga—O.S. No. 181 of 1924, District Munsif's Court, Sivaganga).

The Advocate-General and *M. Venkatasubbiah* for appellants.

S. Varadachariar, S. T. Srinivasagopalachariar and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—Plaintiffs 1, 2, 3, 5 and 18 are the appellants. This second appeal arises out of a suit instituted by the plaintiffs for possession of the suit property and for demolition of a wall built by defendants 1 and 2 on the plaint site. The plaintiffs' case is that the suit property belongs to them by purchase, that they have been in effective possession of the property for a considerable number of years and that while they were in possession, on or about the 25th of February, 1924, the defendants trespassed upon it and began to construct the wall referred to in the plaint. The District Munsif found both title and possession in favour of the plaintiffs and gave them a decree. The learned Subordinate Judge found on appeal that the plaintiffs' title was proved but that they failed to prove possession within 12 years and accordingly dismissed the suit.

The only point argued in second appeal relates to the decision of the Subordinate Judge on the question of limitation The land in question is admittedly waste land. The contesting defendants gave evidence to show that prior to 1924, for about 6 or 7 years a butcher was in possession of the land with

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their permission. This evidence was intended to disprove the specific case of dispossession set up by the plaintiffs in the year 1924. It is not seriously contended that Art. 142 of the Limitation Act is not applicable to the case. The averments in the plaint, the issues and the evidence show that the case falls clearly under Art. 142 and not under Art. 144. What the learned Advocate-General argues is that *having regard to the nature of the land,* which is admittedly a waste land, the learned Subordinate Judge should have held that possession follows title and that the plaintiffs were therefore in possession of the suit land, and that inasmuch as the defendants have not shown possession for more than 7 years, the question of limitation should have been decided in plaintiffs' favour. In other words, he argues that having regard to the special circumstances of the case it does not seriously matter whether Art. 142 or 144 applies to the case; and that since possession should be deemed to have been presumptively with the plaintiffs as they have proved their title to the land, the defendants should not be allowed to succeed unless they prove adverse possession of the land for over 12 years. This argument is fallacious and cannot be accepted. It is true that in the case of waste land, if the plaintiff proves his title to it he can prove possession by relying on the presumption that possession follows title inasmuch as possession of waste land cannot be proved by acts of actual user; but if the plaintiff puts forward a case of effective possession and adduces evidence in support of it as the plaintiffs have done in this case, then, he cannot give up that case and rely upon any "presumption" in support of his possession because the special case set up by him is inconsistent with any such presumption. The following passage from the judgment in *Rakhal Chandra Ghose* v. *Durga Das*[1] makes this point very clear:

" . . Where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where, having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he excercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it"

In the present case it is stated in the plaint that the plaintiffs were in possession of the suit plot, that they tried to erect

1. (1922) 67 I.C. 673

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a temple on it and then erected a Nandavanam; and while they were in such effective occupation and enjoyment the defendants trespassed and began to build a wall on the plot in question (*see* paragraphs 7, 12 and 13 of the plaint). In this connection it should also be noted that not content with saying that they were in such effective occupation of the suit plot they relied upon the possession and enjoyment to such an extent that they claimed also prescriptive *title* to the land by adverse possession (*see* paragraph 13 of the plaint). Evidence in support of these pleas was also adduced by them. These circumstances would show how inconsistent is the present plea of "presumptive possession" with the actual case put forward by them in the plaint and sought to be supported by their evidence. The defendant's evidence of possession of the suit plot on their behalf for over 7 years was intended only to rebut the actual dispossession in 1924 alleged by the plaintiffs. Having regard to the case put forward by the plaintiffs, the defendants were not called upon to prove any case of adverse possession for over 12 years. In my opinion the onus was rightly thrown by the lower Courts on the plaintiffs of proving possession of the property within 12 years of the suit; and as the evidence on the question of possession was disbelieved by the lower appellate court the suit was rightly dismissed. I would therefore dismiss this second appeal with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

V. Guruvappa Chetty .. *Appellant** (*Plff.*)

v.

Thayarammal and others .. *Respondents* (*Defts.*).

Guruvappa Chetty v. Thayarammal.

Restitution of conjugal rights—Suit for—Maintainability—Criminal Procedure Code (V of 1898), S. 488—Order for maintenance by consent—If a bar

A consent order under S 488 of the Code of Criminal Procedure is, as such, no bar to a suit by the husband for restitution of conjugal rights, unless, indeed, the husband had consented not merely to the order for maintenance but that in all circumstances the wife should live apart from him.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O.S. No. 477 of 1927.

*City Civil Court Appeal No. 13 of 1928. 27th October, 1930.

Guruvappa Chetty v. Thayarammal.

Curgenven, J.

R. V. Seshagiri Rao for appellant.

P. Viswanatha Aiyar and *V. N. Srinivasa Rao* for respondents.

The judgment of the Court was delivered by

Curgenven, J.—The plaintiff sued as against his wife, the first defendant, for restitution of conjugal rights and as against defendants 2 to 4, who are respectively his wife's parents and brother, for an injunction restraining them from in any manner interfering with him and his wife and from keeping his wife away from him without his consent. The learned City Civil Judge has dismissed the suit upon a finding upon what may be termed a preliminary issue, the second.

The plaint was filed on the 5th of August, 1927, and it appears that on the 31st of May of that year a consent order was passed by the Presidency Magistrate, Georgetown, between the same parties under S. 488 of the Code of Criminal Procedure in these terms: "By consent of both parties, sum of Rs. 6 per mensem is ordered for the maintenance of the petitioner by her husband, the counter-petitioner." The learned City Civil Judge is of opinion that, as the plaintiff has expressly consented to such an order, it operates as a bar to his suit for restitution of conjugal rights. Now it is not contended that where an order is passed under S. 488 after consent, it operates as such a bar. In fact there is now statutory recognition of the independence of the Civil Court in this matter by the enactment of sub-section (2) of S. 489 of the Criminal Procedure Code, the Magistrate being required to modify his order in consequence of any decision of a competent Civil Court. Does the circumstance that the order in this instance was a consent order make any difference? We think that it clearly makes no difference, unless it appears that something more than a consent to the order of the Magistrate was involved. In considering what the consequence of consent to such an order must be, we must consider the scope of the order which was consented to, and there is no reason to suppose that such an order, even when passed after consent, would have an effect in excess of an order passed without such consent. For instance, we cannot suppose that the provisions of S. 488 (4) and (5) which enable a Magistrate to cancel his order, or of S. 489 (1) which enable him on proof of a change in the husband's circumstances to modify it, would be affected by the fact that the original order was not passed on an adjudication but by consent. Now would the fact of consent exclude the

operation of sub-section (2) of S. 489, already alluded to. Unless, therefore, it were expressed in the consent given that the consenting party agreed that in all circumstances the wife should live apart from him and should be entitled to the maintenance agreed upon, we are clearly of the opinion that it cannot operate so as to extend the scope of the order or to restrict the jurisdiction of the Civil Court to supersede it. We have been asked to frame an issue inquiring whether in the circumstances of the present case the consent given was not merely to the order in the terms in which it is drafted but was more unqualified and in effect a consent that the wife should live apart and should receive maintenance without such limitations as the order necessarily imposes. But we cannot find any such position taken up in the first defendant's written statement as would warrant such a course. In fact in paragraph 8 it is clearly said that the plaintiff agreed to a consent order on the maintenance application if the hurt case which was filed at the same time by the first defendant was compounded, that the hurt case was accordingly compounded and a consent order passed, and paragraph 12 carries the matter no further because it only expresses the contention that the suit is not sustainable until the consent order of maintenance is set aside. We think, therefore, that the order carrying, as it must, the ordinary consequences of an order passed under S. 488 of the Code of Criminal Procedure is no bar to the plaintiff's claim and we must accordingly answer issue No. 2 by saying that the suit is maintainable.

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Curgenven, J.

We accordingly set aside the decree of the Lower Court and remand the suit for trial upon the remaining issues. Costs will abide the event. The appellant will be entitled to a refund of the Court-fees paid on the Memorandum of Appeal.

S.R. *Decree set aside and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

C. Abdul Hakim Sahib and another .. *Plaintiffs**

v.

Chattanadha Aiyar and others .. *Defendants.*

Court Fees Act (VII of 1870), Ss 3 and 4—Fees payable on a suit transferred from the City Civil Court to the High Court—Cl (13) of the Letters Patent—High Court-fees rules—S 107 of the Government of India Act—Madras City Civil Court Act (VII of 1892), S 14.

Abdul Hakim Sahib v. Chattanadha Aiyar.

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*Application No 2257 of 1930. 26th November, 1930.
C S No. 532 of 1930. on the file of the High Court
O.S. No. 416 of 1929 on the file of the City Civil Court, Madras.

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Where a suit was transferred from the City Civil Court to the High Court under cl. (13) of the Letters Patent, on the questions, (1) whether in a suit so removed and tried by the High Court as a Court of Extraordinary Original Jurisdiction, Court-fees are leviable under the Court Fees Act or under the High Court-fees rules, and (2) whether, when a suit filed in the City Civil Court is so removed, it follows the general rule or is governed by any special rules,

Held that, though when a suit is transferred under cl. (13) of the Letters Patent the Court-fees leviable are governed by the Court Fees Act and not by the High Court-fees rules, in cases removed from the City Civil Court the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Jurisdiction, as the position is expressly governed by S. 14 of the Madras City Civil Court Act (VII of 1892).

Besant v. *Narayaniah*, (1914) L.R. 41 I.A. 314: I.L.R. 38 M. 807: 27 M.L.J. 30 (P.C.) referred to.

V. V. Srinivasa Aiyangar and *K. P. Ramakrishna Aiyar* for 2nd plaintiff.

J. A. Pinto for 1st defendant.

The Court delivered the following

JUDGMENT.—This matter has been posted for being spoken to. While the ruling I gave the other day applies generally to suits removed to the High Court under cl. (13) of the Letters Patent, it cannot govern cases transferred from the City Civil Court, as a special Act applies in that case. The question at present arises in such a case and I therefore desire to amplify my ruling so as to make it applicable also to cases of that description.

The questions I have to decide may be thus stated:

(1) When a suit is removed and tried by the High Court as a Court of Extraordinary Original Jurisdiction, are Court-fees leviable under the Court Fees Act or under the High Court Fees Rules?

(2) When a suit filed in the City Civil Court is so removed, does it follow the general rule or is it governed by any special provisions?

I must first turn to the Court Fees Act. *Chapter II of that Act* relates to fees in the High Courts and in the Presidency Small Cause Courts; *Chapter III* to fees in other Courts and in public offices. (See titles at head of these two Chapters.) What we have to deal with at present is Chapter II, which consists only of three sections. The first of those sections is S. 3. The distinction between S. 3 and S. 4 must be carefully observed. Whereas the latter section prescribes the Court-fee, the former, subject to an exception which I shall notice presently, merely regulates the mode of collection. S. 4 enacts that no document specified in the first or the second schedule of the Act as chargeable with fees shall be filed in or received by the High Court in certain cases, unless, in respect of such document, there

be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. The cases are thus specified:

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Cases coming before the High Court—

(1) in the exercise of its extraordinary original civil jurisdiction;

(2) in the exercise of its extraordinary original criminal jurisdiction:

(3) in the exercise of its jurisdiction as regards appeals from the judgments of one or more Judges of the said Court or of a Division Court;

Original Side appeals are however excluded;

(4) in the exercise of its jurisdiction as regards appeals from the Subordinate Courts;

(5) in the exercise of its jurisdiction as a Court of reference or revision.

It follows from this section, that in cases coming up before the High Court in the exercise of its other jurisdictions, the fees prescribed by the Court Fees Act are not, as such, leviable. For instance, in Original Side Suits and Original Side Appeals, the fees chargeable are not governed by the Court Fees Act. Section 4 in its language resembles S. 6 which occurs in Chap. III. With these remarks, let me now examine the other section to which I have referred, namely, section 3.

It provides that the fees

(1) payable by the clerks and officers of the High Court by virtue of the power conferred by S. 15 of the High Courts Act, 1861 (now S. 107 of the Government of India Act);

(2) chargeable in such Courts under No. 11 of the first and Nos. 7, 12, 14, 20 and 21 of the second schedule of the Act;

(3) chargeable in the Presidency Small Cause Courts and their offices;

shall be collected in the manner prescribed by the Act.

This is a most clumsily worded section. The Court Fees Act, it has been repeatedly pointed out, is full of defects and imperfections. (See the valuable introduction to Mr. Satyamurthi Aiyar's Commentaries on the Court Fees Act, Ed. 1930). I am not aware of any decision which has adverted to this particular defect; but S. 3, in my opinion, is clearly an instance of bad drafting. So far as its language goes, it does not profess to prescribe a Court-fee; it purports on the contrary to deal only with the mode of collecting it. But by implication it prescribes

a Court-fee in certain cases. That is the effect of the second clause which runs thus:

"or chargeable in each of such Courts under No. 11 of the first and Nos. 7, 12, 14, 20 and 21 of the second schedule to this Act annexed."

Of those mentioned above, Art. 11 of the first schedule and Art. 12 of the second, deal with certain matters falling within the High Court's exercise of Testamentary Jurisdiction and similarly Arts. 7, 14, 20 and 21 deal with matters pertaining to its Matrimonial Jurisdiction.

The effect of the two sections may then be shortly stated thus. In certain cases coming before the High Court, the Court Fees Act itself prescribes the fee leviable. (Section 4 and cl. (2) of S. 3.) In all other cases coming before that Court, the Court Fees Act lays down only the mode of collecting the Court-fee. (Section 3, cl. (1).) In the case of the Presidency Small Cause Courts also, it merely prescribes the mode of collecting the fee. (Section 3, cl. (3).)

As I have said, the question I have to decide is, what are the Court-fees leviable in a case tried by the High Court in the exercise of its Extraordinary Original Civil Jurisdiction? The Court Fees Act says, that, in such a case, the fees leviable are those prescribed by the Act itself. But the High Court has framed its own Court Fees Rules. In the preamble to those rules, it is stated that the tables of fees set forth shall be used and observed in the High Court in all cases *inter alia* coming before it "in the exercise of its ordinary and extraordinary original jurisdiction." So far as the Ordinary Original Civil Jurisdiction is concerned, the Court Fees Act, as I have shown, does not itself prescribe the fees chargeable. To that extent, the High Court's power to frame its own rules is undoubted. But as regards the extraordinary original civil jurisdiction of the High Court, the Court Fees Act directly applies. Can the High Court make rules for observance in cases falling within this jurisdiction, overriding the provisions of the Court Fees Act? This is the question I have now to decide. I must first mention that the preamble as it originally stood did not contain the words "and extraordinary." These words were added by an amendment made in 1927. Then we must enquire from where the High Court derives its power, to make rules in regard to its Court-fees. Barring *S. 107 of the Government of India Act* (repealed S. 15 of the High Court Charter Act), no other provision conferring the power is traceable. That section says that each of the High Courts may settle tables of fees to be allowed to the Sheriffs, Clerks and Officers of Courts. *Section 3 of the Court Fees*

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Act assumes that the fees payable to such clerks and officers are by virtue of this very section. It is these fees that S. 3 prescribes shall be collected in the manner provided by that Act. The mode of collection is regulated by S. 25, which enacts *inter alia* that the fees referred to in S. 3 shall be collected by stamps. My reason for referring to S. 3 of the Court Fees Act in this connection is, that it fortifies my view that the High Court's power to make rules is derived from S. 107 of the Government of India Act. That section is not happily worded. Its marginal note indicates that it deals only with the High Court's powers in respect of Subordinate Courts. Clauses (*a*), (*b*), (*c*) and (*d*) deal only with such Courts. But cl. (*e*) is more general and deals with all Courts including the High Courts. [The word "such" is absent in cl. (*e*).]

If, then, it is from S. 107 that the High Court derives its power to make rules, does it place any limitation on such power? The proviso to S. 107 says that the table of fees to be framed shall not be inconsistent with the provisions of any Act for the time being in force. The Fees Rules which the High Court has framed in respect of its extraordinary original civil jurisdiction are inconsistent with the provisions of the Court Fees Act. To that extent, they are *ultra vires* of the High Court. It therefore follows that when a suit is transferred under cl. (13) of the Letters Patent, the Court-fees leviable are governed (subject to the exception to which I shall presently refer) by the Court Fees Act and not by the High Court Fees Rules.

The same result follows from another line of reasoning. It has been held that the powers of the High Court in dealing with suits transferred under cl. (13) of the Letters Patent are those which, but for the transfer, might have been exercised by the Court from which the suit is transferred. *Besant* v. *Narayaniah*.[1] This is enacted by cl. (20) of the Letters Patent, which runs thus:

"And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Madras, in the exercise of its Extraordinary Original Civil Jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein."

Then as to suits transferred from the City Civil Court, S. 14 of the Madras City Civil Court Act (VII of 1892) provides:

"When, under S. 13 of the Letters Patent for the High Court, dated the 28th day of December, 1865, or under S. 25 of the Code of Civil Procedure (corresponding to S. 24 of the present Code—Act V of 1908) the

1. (1914) L.R. 41 I.A. 314 I.L.R. 38 M. 807 27 M.L.J. 30 (P.C.).

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High Court has removed for trial by itself any suit from the City Court, fees on the scale for the time being in force in the High Court as a Court of Ordinary Original Civil Jurisdiction shall be payable in that Court in respect of the suit and proceedings therein:

Provided that, in the levy of any such fees which, according to the practice of the Court, are credited to the Government, credit shall be given to the plaintiff in the suit for any fee which in the City Court he has already paid under the Court Fees Act, 1870, on the plaint"

This section expressly enacts that the fees leviable shall be on the scale in force, in the High Court, as a Court of Ordinary Original Civil Jurisdiction. It has been argued, that on a true construction, this section does not apply to the pleadings, but only to such proceedings as are taken *subsequent* to the transfer. This argument fails to give effect to the words "the suit" as contrasted with "and proceedings" in the above section. Moreover, the proviso makes the matter perfectly clear. It says, that in the levy of the fees, credit shall be given to the plaintiff for any fee which in the City Court, he has already paid on the plaint. How is this credit to be given? Let us take a concrete case. Supposing on the plaint when it was filed in the City Civil Court, a stamp of the value of Rs. 130 was affixed, the suit is then transferred to the High Court. Credit has to be given under the section for Rs. 130. It specially confers on the plaintiff that benefit. When credit is being given, is the total of the Court-fees payable in the High Court to be taken into account or such total, *minus* the institution fee? Under the High Court Fees Rules, there are certain Court-fees payable in addition to the stamp on the plaint; for instance, a sum of Rs. 10 is leviable on the hearing of a suit for the first day and of Rs. 20 for every subsequent day; for each exhibit marked at a hearing, a sum of Rs. 2 has to be paid. If the total Court-fee is taken into account in giving credit, the result would be to make the plaintiff pay the excess fee on the plaint. But if the argument advanced is accepted, it leads to this. You must only take into account the total *minus* the institution fee—that is, the Rs. 130, which the plaintiff has already paid, goes merely in reduction of such fees as are payable exclusive of the stamp on the plaint. In other words, the plaintiff in a suit transferred, may say:

"I have already paid Rs. 130 in the City Civil Court. Give me credit to that extent in the hearing and exhibit fees."

The result would then be, that for his plaint in the High Court, he would have paid no fee at all.

A construction that leads to such an absurdity must be rejected. The procedure indicated under the section is this. A certain amount is the aggregate of the Court-fees payable in the

High Court, the institution fee being but one item of such Court-fees. Towards this total, he must get credit for the Court-fee already paid on his plaint.

It is also contended that the policy of the Court Fees Act is to forbid the filing of a document not properly stamped and that when a plaint is received in the High Court by reason of the transfer of a suit, it cannot be said that there is a filing of the plaint. This may or may not be a correct statement of its policy; but I have nothing to do with it. The present point is governed by an express statutory provision and it is my duty to give effect to it. I therefore hold that in cases removed from the City Civil Court, the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Civil Jurisdiction.

The suit now transferred is what was filed in the City Civil Court. The written statement contains a counter-claim. The plaint and the statement bear stamps of the value prescribed by the Court Fees Act; but if the High Court Fees Rules apply, a higher fee is payable, certain excess sums in respect of the plaint and the counter-claim, which the office has demanded. In my judgment, these sums must be paid. I direct the plaintiff to pay them.

K.C. *Ordered accordingly.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD BLANESBURGH, LORD MACMILLAN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Miss Dottie Karan and others .. *Appellants**

v.

Rai Bahadur Lachmi Prasad Sinha and others ... *Respondents.*

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Miss Dottie Karan v. Rai Bahadur Lachmi Prasad Sinha.

Indian Registration Act (XVI of 1908), Ss 32, 33, 34 and 87—Presentation of mortgage-deed for registration—Special power of attorney—Alteration of date of mortgage in—No jurisdiction—Invalidity of registration—No estoppel against statute

The mortgagors executed a special power of attorney on the 10th February, 1910, before the Sub-Registrar of Allahabad, whereby they empowered the agent to present a mortgage-deed, dated the 8th February, 1910, for registration before the Sub-Registrar of Monghyr After the execution of the said power, but without the consent or by the authority of the executants of the special power, the date of the mortgage-deed, as stated in the power, was altered to 4th October, 1910. Purporting to act under

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*P.C. Appeal No 92 of 1928. 16th December, 1930.
Patna Appeal No 54 of 1927.

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the power of attorney, as so altered, the agent on the 5th October, 1910, presented for registration to the Sub-Registrar of Monghyr a mortgage-deed, dated the 4th October, 1910, and the Sub-Registrar, without noticing the said alteration of the date in the special power, registered the mortgage-deed. *Held*, that, having regard to the provisions of the Indian Registration Act, 1908, sections 32, 33 and 34, the registration of the mortgage-deed was invalid and no mortgage was effected thereby. The special power was no authority for the agent to present for registration any mortgage, dated the 4th October, 1910, and as the special power was the only authority produced to the Sub-Registrar of Monghyr, he had no jurisdiction to accept the mortgage for registration. *Held*, further, that this was not merely a case of defect of procedure, curable under section 87 of the Act, but disclosed a want of jurisdiction in the Registering Officer

Held, also, that, assuming the mortgagors had represented to the mortgagee that the agent had a special power to register the mortgage-deed for them and that he (the mortgagee) had acted upon such representation, these facts did not estop the mortgagors from challenging the validity of the registration, inasmuch as the express provisions of the Registration Act were not complied with

Judgment of the High Court, Patna, reversed

Appeal No. 92 of 1928 against a judgment and decree, dated the 9th August, 1927, of the High Court, Patna, setting aside a judgment and decree, dated the 20th December, 1923, of the Court of the Subordinate Judge of Monghyr.

The principal question for determination on this appeal related to the validity of the registration of a mortgage-deed, dated the 4th October, 1910, executed by the appellants-defendants, in favour of plaintiff No. 1 (respondent). The material facts of the case are set out in their Lordships' judgment.

Dube for appellants.

Subba Rao for respondents.

16th December, 1930. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal against a judgment and decree, dated the 9th August, 1927, of the High Court of Judicature at Patna, setting aside a judgment and decree, dated the 20th December, 1923, of the Court of the Subordinate Judge of Monghyr.

The suit was brought on the 12th September, 1922, by Lachmi Prasad Sinha and his co-plaintiffs, who are members of a Hindu joint family, against Christiana Benshaw and her daughter, Dottie Karan, claiming to recover Rs. 21,770-6-3 in respect of principal and interest alleged to be due on a mortgage, dated the 4th of October, 1910, and to enforce the said mortgage by sale of the mortgaged property. The Subordinate Judge dismissed the plaintiffs' suit with costs.

The plaintiffs appealed to the High Court, which allowed the appeal and made a decree for sale of the mortgaged property

in favour of the plaintiffs. Christiana Benshaw died while the appeal was pending in the High Court, and her husband, Samuel Benshaw and his daughter Mercia Benshaw, were added as legal representatives of the said Christiana Benshaw.

Dottie Karan, Mercia Benshaw and Samuel Benshaw have appealed against the decision of the High Court to His Majesty in Council.

Christiana Benshaw first married Rai Bahadur Dhiraj Karan, an Indian Christian. By him she had a daughter, Dottie Karan, who is the first appellant, and a son, David Karan, who died before this litigation began.

After the death of her first husband, Christiana married the above-mentioned Samuel Benshaw, by whom she had a daughter, the above-mentioned Mercia Benshaw. These two persons are the other appellants.

Rai Bahadur Dhiraj Karan died on the 13th of December, 1895, leaving him surviving his widow, Christiana, his son, David, and his daughter, Dottie.

The plaintiffs' case was that after her marriage to Samuel Benshaw, Christiana appointed him her agent, and gave him a general power of attorney, dated the 6th April, 1898, that on or about the 6th May, 1909, Christiana Benshaw borrowed Rs. 500 from Lachmi Prasad Sinha on a note of hand; that as she required a further advance she arranged with Lachmi Prasad Sinha through her husband and agent, Samuel Benshaw, that he should advance a further sum of Rs. 2,500, and that her first husband's share in Mahal Kamarpar should be mortgaged by her and her two children, David and Dottie Karan, as security for the two sums of Rs. 2,500 and Rs. 500, making a total of Rs. 3,000 and interest thereon.

It was alleged on behalf of the plaintiffs that on the 4th October, 1910, Christiana Benshaw, Dottie Karan and David Karan executed a mortgage-deed in favour of Lachmi Prasad Sinha at Monghyr in the presence of attesting witnesses, and that at that time the sum of Rs. 2,500 was paid by him to Christiana Benshaw. It was alleged that the month of February had been inserted as the date at the end of the mortgage-deed, and that at the time of execution the word "February" was crossed or blotted out, and the date the 4th October, 1910, was inserted.

This was done, it was alleged, with the consent of the executants and the alteration was initialled by Samuel Benshaw.

There is no doubt that a date in the mortgage has been crossed out, and it was alleged on behalf of the defendant-

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appellants that what was crossed out was not only the month February, but also the day of the month, viz., the 8th.

On the 5th October, 1910, the mortgage-deed was registered at Monghyr by the Sub-Registrar on the admission of execution by Samuel Benshaw, who presented a special power of attorney dated the 9th February, 1910, purporting to have been executed by Christiana Karan (then Christiana Benshaw), Dottie Karan and David Karan before the Sub-Registrar of Allahabad on the 10th of February, 1910.

The defendants admitted their signatures to the mortgage deed, but they denied that they executed it at Monghyr on the 4th October, 1910, or that they received any consideration money. They alleged that they were at Allahabad on the 4th of October, 1910, and they stated that they had not authorized Samuel Benshaw to admit execution of the mortgage, which was dated the 4th October, 1910, and that the only mortgage executed by them was dated the 8th February, 1910.

The defendants further contended that the attestation and registration of the mortgage were not according to law, and that, therefore, the deed was inoperative as a mortgage.

The Subordinate Judge held that the executants were at Allahabad on the 4th October, 1910; that they did not go to Monghyr on that date; that the deed was signed at Allahabad and attested subsequently at Monghyr, and consequently, it was not validly attested. He also held that Mr. Benshaw had no authority to admit the execution of the deed, dated the 4th October, 1910, but only of a deed, dated the 8th February, 1910; and that the deed was not validly registered. He further held that as the executants did not go to Monghyr it followed that they did not receive the consideration money. In the result he dismissed the plaintiffs' suit with costs.

On the plaintiffs' appeal, the High Court held that the mortgage was duly executed at Monghyr in the presence of attesting witnesses; that Samuel Benshaw had authority to admit execution of the mortgage-deed on behalf of the executants before the Sub-Registrar; that in any case, as the executants had represented to Lachmi Prasad Sinha that Samuel Benshaw had such power and thereby induced Lachmi Prasad Sinha to act on that representation they could not now deny Benshaw's authority, and consequently, the deed was validly attested and registered. They also held that the executants received consideration money. They set aside the decree of the Subordinate Judge and ordered that a preliminary decree be drawn up for the amount due under

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the mortgage together with costs in both Courts in favour of the plaintiffs.

Against that decree of the High Court the defendants, Dottie Karan, Mercia Benshaw and Samuel Benshaw, have appealed to His Majesty in Council. As already stated, the two last mentioned defendants are parties to this appeal in their capacity of legal representatives of Christiana Benshaw.

Their Lordships do not find it necessary to give any decision upon the questions of fact involved in the above-mentioned contentions of the parties, as to which the evidence was conflicting, and in respect of which the Courts in India arrived at different conclusions, because, in their Lordships' opinion, this appeal can, and must, be decided upon the question relating to registration of the mortgage bond.

As to the last-mentioned point there is no dispute as to the material facts.

The special power of attorney executed by Christiana Benshaw, Dottie Karan and David Karan, under which Samuel Benshaw purported to act when he admitted execution of the mortgage-deed before the Registrar at Monghyr on the 5th October, 1910, is as follows:—

"We are Mrs. Christiana Benshaw Nee (*sic*), Mrs. Christiana Karan, widow of late Rai Dhiraj Karan Bahadur, Miss Dottee Karan, daughter and Mr. David Karan, son of late Rai Dhiraj Karan Bahadur, residents of Mohalla Belau Bazar, Pargana, police station, sub-registry office and district Monghyr, at present residing at South Road, Allahabad, by nationality Christians, by occupation Zamindars

"We, the executants have executed a mortgage bond, dated 4th October, 1910, for Rs 3,000 in favour of Babu Lachhmi Parshad Sinha, son of Babu Beni Ram, deceased, by caste Amast Kayasth, resident of Lachhmi Nagar Gogri, Pargana Pharkia, police station Gogri, district Monghyr, at present residing at Monghyr fort, by occupation a Zamindar, and have affixed our signatures thereon by our own pen. As it is necessary and requisite for us to present the said bond before the Registrar of district Monghyr, and to have it registered, we of our own accord and free will, have appointed Mr Samuel Benshaw, husband of me Christiana Benshaw, by nationality a Christian, resident of Belan Bazar, Pargana Monghyr, police station Monghyr, district Monghyr, by occupation a Zamindar as our Mukhtar Khas (special agent) and we do declare that the said Mukhtar shall present the said bond containing our signatures before the Sub-Registrar of Monghyr, within the jurisdiction of the Hon'ble High Court in Calcutta, get the same registered on his own admission, on our behalf and affix his signature as our Mukhtar, to his admission, and effect exchange of equivalents after the deed is registered. These acts done by the said Mukhtar are and shall in every way be accepted and ratified by us as done by us as personally Therefore, we have executed this special power of attorney so that it may be of use when required.

"Dated the 9th February, 1910.

"Christiana Karan now Christiana Benshaw.

"Dottie Karan.

"David Karan.

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"*Scribe*—Muhammad Yasin, resident of Mahalla Belan Bazar, Monghyr, at present residing at Allahabad."

On the special power there is an endorsement by the Sub-Registrar of Allahabad to the effect that the said power of attorney was executed before him by the above-mentioned executants on the 10th February, 1910, and the said power bears the seal of the Sub-Registrar of Allahabad.

The said power also bears the name and seal of the District Sub-Registrar of Monghyr, and the date the 5th October, 1910.

It is to be noted that the date of the mortgage bond referred to in the special power of attorney is given as the 4th October, 1910.

Inasmuch as the special power of attorney was executed on the 10th February, 1910, and the executants state therein that they "have executed a mortgage bond," it is obvious that the date "4th October, 1910," could not have been in the special power when it was executed.

Both the Courts in India have found that the date of the mortgage bond stated in the special power, when it was executed, was the 8th February, 1910, and that the said date, viz., the 8th February, 1910, had been altered to the 4th October, 1910.

The High Court further found that the alteration must have been made after the registration[1] of the special power had been effected at Allahabad on the 10th February, 1910.

With this finding their Lordships agree. The High Court further held that the alteration must have been made at the instance of Samuel Benshaw, as the special power was in his possession. This may or may not be correct; it is, however, not material for the consideration of the present question, for their Lordships are satisfied that there is no ground for holding that the alteration was made with the consent or by the authority of the executants of the special power.

In the consideration of this question, therefore, it must be taken that the special power given on the 10th February, 1910, by the three executants to Samuel Benshaw, was in respect of a mortgage bond, dated the 8th February, 1910, which the executants stated they had executed. The executants thereby gave Samuel Benshaw power to present the said bond before the Sub-Registrar of Monghyr.

The question is whether the registration of the mortgage bond, dated the 4th October, 1910, which Samuel Benshaw

1 *i.e.*, authentication under section 33, sub-section (1) (*a*) of the Registration Act.

purported to effect in pursuance of the above-mentioned special power was a good and valid registration.

For the consideration of this question it is necessary to refer to certain sections of the Transfer of Property Act, 1882 (IV of 1882), and of the Indian Registration Act (XVI of 1908).

Section 59 of the Transfer of Property Act, 1882, provides that:

"59 Where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

This section applies to the mortgage in suit inasmuch as the principal money secured thereby was more than Rs. 100, and, therefore, the alleged mortgage could be effected only by a registered instrument.

By section 3 of the said Act "registered" means registered in British India under the law for the time being in force regulating the registration of documents. The law regulating the registration of documents in force at the time when the mortgage was executed was the Indian Registration Act of 1908, which came into force on the 1st January, 1909.

Section 17 (1) (*b*) is as follows:—

"The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871 or the Indian Registration Act, 1877, or this Act came or comes into force, namely.—

(*b*) Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property"

Section 32 is the next material section.

"32. Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office—

"(*a*) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

"(*b*) by the representative or assign of such person, or

"(*c*) by the agent of such person, representative or assign, duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned"

Sub-clause (*c*) is applicable to the facts of this case, inasmuch as the alleged mortgage was presented for registration by Samuel Benshaw purporting to act under the above-mentioned special power.

Section 33 specifies the powers of attorney which shall alone be recognized, and sub-section (1) (*a*) is applicable to this case, and is as follows:—

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"For the purposes of section 32 the following powers of attorney shall alone be recognized, namely—

"(a) If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides "

Section 34 provides for the time within which the persons or their representatives must appear before the Registrar for presentation, and sub-section (3) (c) provides that the registering officer shall thereupon in the case of any person appearing as a representative, assign or agent satisfy himself of the right of such person so to appear.

In their Lordships' opinion it is clear that the registration of the mortgage of the 4th October, 1910, was not effected in accordance with the above-mentioned provisions of the Registration Act.

An examination of the special power of attorney ought to have shown the Registering Officer to whom Samuel Benshaw presented the mortgage, that the matter was not in order. The special power on the face of it bore the date 9th February, 1910, and the endorsement by the Allahabad registering officer showed that it was executed before him on the 10th February, 1910. This special power was being used by Samuel Benshaw as an authority to present a mortgage which the executants in the said power were made to say that they had executed on the 4th October, 1910, which disclosed an impossible state of affairs. Apart from this, however, it is clear, as already stated, that when the executants signed the special power of attorney the mortgage, which Samuel Benshaw was thereby empowered to present for registration, in fact, was dated the 8th February, 1910; that date was altered after the special power had been registered on the 10th February, 1910, but without the consent or authority, of the executants.

In their Lordships' opinion the special power was no authority for Samuel Benshaw to present for registration any mortgage, dated the 4th October, 1910, and inasmuch as the special power was the only authority produced to the Registering Officer, that officer had no jurisdiction to accept the said mortgage for registration.

It was, however, argued on behalf of the plaintiffs, that section 87 of the Registration Act was material, and that by reason of the terms thereof the registration should not be deemed invalid.

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Section 87 is as follows:—

"87. Nothing done in good faith pursuant to this Act or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure."

Their Lordships are unable to accept this contention. The facts of this case do not show a defect of procedure; but, on the contrary, they do disclose a want of jurisdiction in the Registering Officer.

It was then contended on behalf of the plaintiffs that the general power of attorney, dated the 6th April, 1898, and given by Christiana Benshaw to Samuel Benshaw was sufficient authority to enable him to present the mortgage in suit for registration. This contention is without any substance.

The power of attorney given by Christiana Benshaw alone was no authority to Samuel Benshaw to present a mortgage purporting to be given by Christiana Benshaw, her son and daughter.

Further, as far as their Lordships are aware, the general power of attorney was not produced to the Registering Officer or acted upon by him.

The High Court were of opinion that the evidence of the plaintiff Lachmi Prasad Sinha showed that the executants represented to him that Samuel Benshaw had a special power to register the mortgage bond for them, that he acted upon such representation, and that consequently it was not open to the defendants to challenge the validity of the registration. Even assuming the facts as found by the High Court, their Lordships are of opinion that they cannot constitute any estoppel in this case having regard to the fact that the express provisions of the Registration Act have not been complied with.

Their Lordships are of opinion that the mortgage bond in suit was not registered in accordance with the provisions of the Indian Registration Act; accordingly it was not a registered instrument, and no mortgage was effected thereby.

For these reasons and without expressing any opinion on the other issues raised in the case, their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment and decree of the High Court set aside, and the decree of the Subordinate Judge restored. The plaintiffs must pay the costs of the defendant-appellants in the High Court and of this appeal.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant and Dold.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE BARDSWELL.

Kunhi Kutti Ali and another .. *Appellants** (*Defts.*)

v.

Muhammad Haji (died) and others .. *Respondents* (*Plffs.*).

Kunhi Kutti Ali v. Muhammad Haji.

Malabar Law—Karnavan—Lease by—Suit to set aside—Junior members—Right of—Civil Procedure Code (V of 1908), O 26, R 10 (3)—Issue of two Commissions for same purpose—Impropriety

A pattadharam executed by the Karnavan of a tarwad granting a kuzhikanom lease for a period of twelve years is an ordinary act of management within the competence of the Karnavan and no suit is maintainable by a junior member of the tarwad to set it aside in the absence of exceptional circumstances

Abdulla Koya v. *Eacharan Nair,* (1917) 35 M.L.J. 405; *Ottaparakkal Thazhath Soopi* v. *Mariyamma,* (1919) 38 M.L.J. 207 and *Kizhakkumbrath Moideen* v. *Koyambrath Murkothkandi,* (1927) 108 I.C. 738, followed.

Packi v. *Muhammad,* (1925) 49 M.L.J. 513, referred to.

P. P. Kunhamod Hajee v. *P P. Kuttiath Hajee,* (1881) I.L.R. 3 Mad. 169; *Anantan* v. *Sankaran,* (1891) I.L.R. 14 Mad. 101; *Vatavatta Nair* v. *Kuppassan Menon,* (1918) 36 M.L.J. 630, *Chowkaran Kunhi Pocker* v. *Chowkaran Malikaumal Valia Bappotty,* (1919) 37 M.L.J. 544; *Koppassa Menon* v. *Kalliani Ammal,* (1923) 45 M.L.J. 258; *Ara Pidikayil Bikkutti* v. *Kalendan,* (1890) I.L.R. 14 Mad. 267: 1 M.L.J. 227, *Chappan* v. *Raru,* (1912) I.L.R. 37 Mad. 420 and *Manavadan* v. *Sredevi,* (1926) I.L.R. 50 Mad. 431: 52 M.L.J. 277, distinguished.

A second commission should not be issued by the Court for the same purpose for which the first was issued, unless the Court is dissatisfied with the report of the first, in which case, the Court should not take into consideration the report of the first Commissioner

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in O.S. No. 55 of 1922.

T. Rangachariar and *P. Govinda Menon* for appellants.

K. P. Sarvothama Rao and *B. Pocker* for respondents.

The Court delivered the following

JUDGMENT.—The suit under appeal has been brought as a representative suit by a junior member of a Marumakkathayam Tarwad for a declaration that the pattadharam granted on 18th July, 1922, by defendant 1, who is the present Karnavan, is not valid and binding on the plaintiff, his tarwad or the suit properties and for delivery of the suit properties to the plaintiff on behalf of the tarwad. The tarwad consists of two branches, the descendants of two women, Alliathe and Birambi, who were sisters. The defendants are all of the branch of Birambi, while the plaintiff belongs to that of Alliathe and claims to be the

*Appeal No. 128 of 1925. 8th September, 1930.

senior anandravan, though this claim is challenged. The plaintiff asserts that the suit pattadharam has been granted by defendant 1 to two members of his own branch with a view to defrauding the plaintiff of the benefit of the great improvements which he has effected to the suit lands, while it prejudices the tarwad, on whose behalf the suit is brought, in that the amount of rental fixed under it is far too low. The Court below has found that the suit pattadharam was not executed by defendant 1 in the *bona fide* exercise of his powers of management as karnavan of the tarwad, but for the purpose of enriching members of his own tavazhi at the sacrifice of the interests of the entire tarwad, and it has, therefore, granted a decree to the plaintiff as prayed for. Against this decision defendants 2 and 3 are appealing.

It has been urged for the appellants and for defendant 1 as second respondent that the suit is not maintainable on two grounds. The former of these grounds is that leave has not been properly obtained by the plaintiff to sue in a representative capacity. This, however, is a point that we cannot allow to be taken. The plaintiff definitely states in paragraph 14 of his plaint that he has obtained the leave of the Court to sue on behalf of the tarwad and this recital has not been challenged in any written statement, nor was any issue taken as to it. We have to presume in these circumstances that there was no irregularity in the proceedings in the trial Court and that the plaintiff was properly permitted to bring the suit as a representative one.

The other ground is more important. It is that the grant of the pattadharam by defendant 1 was an ordinary act of management by the karnavan, in the exercise of his legitimate powers; and that consequently no suit can be brought by a junior member of the tarwad to have it set aside but that if the view of the learned Subordinate Judge in this particular instance as to the nature of the act of the karnavan that is in question is correct, then the proper remedy was to bring a suit for the karnavan's removal. There is no dispute as to the correctness of the view expressed in the Lower Court's judgment that, on the face of it, the suit pattadharam, which grants a kuzhikanom lease for a period of twelve years, is an ordinary act of management within the karnavan's competence. Stress is laid on *Abdulla Koya* v. *Eacharan Nair*[1] in which a Bench of this Court has remarked in the matter of a suit as to a Melcharth granted, as it was contended, improperly, by a karnavan:

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1 (1917) 35 M.L.J. 405.

Kunhi Kutti Ali v. Muhammad Haji.

"No doubt if a karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the tarwad, this would be a ground for removing him from the karnavasthanam, but we do not think that a particular lease can be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the tarwad. To fetter a karnavan's discretion in this way would be to render his whole management of the property liable to criticism and reversal at any moment."

Again in *Kishakkumbrath Moidin* v. *Koyambrath Murkothkandi*[2] it has been held by a Bench of this Court that where a kanom is executed by a karnavan of a Malabar tarwad for the purpose of paying off a debt binding on the tarwad, the Court is not required to investigate with meticulous care whether the transaction was a prudent one or whether there was necessity for entering into such a transaction for the purpose of raising the necessary amount. On the other hand, a number of decisions have been quoted to us to show that in the case at any rate of kanoms that have been improperly granted, the Court will interfere, and that at the instance of junior members of a tarwad. One of these is *Unni* v. *Kunchi Amma,*[3] which dealt with a suit brought to recover property that had been improperly alienated by a karnavan under a kanom. The point, however, for decision in that case was one of limitation while the kanom had been executed by a previous karnavan who had been removed from office, and the suit was brought by two persons who claimed to have been appointed managers by a decree of Court. In *Anantan* v. *Sankaran*[4] it was held that junior members of a tarwad could maintain a suit against their karnavan, senior anandravan and others for a declaration that a kanom was invalid and for recovery of properties. In that case, however, the kanom was granted not by the karnavan but by the senior anandravan to whom the karnavan had delegated the management under a karar, and emphasis was laid on the fact that the time for filing the suit had almost expired and that the karnavan, who was joined as a defendant had failed to sue. It is to be observed that in *V. K. Packi* v. *V. K. Muhammad*[5] it has been remarked that this decision in so far as it suggests the broad proposition that in all circumstances the junior members will be entitled to sue when the karnavan has failed to do so seems to be opposed to all the prior and subsequent decisions, but that on the actual facts the case came within the accepted principle that the anandravan may be permitted to sue when the

2 (1927) 108 I.C. 738
3 (1890) I.L.R. 14 M. 26
4. (1891) I.L.R. 14 M. 101.
5. (1925) 49 M.L.J. 513.

karnavan has disabled himself from bringing such a suit, that is when the circumstances are exceptional. *Vatavatta Nair* v. *Kenath Puthen Vittil Kuppassan Menon*[6] deals with a suit brought by a senior anandravan for having set aside a kanom granted by the karnavan in office who was defendant 2. The suit was allowed on the principle that a kanom, granted, as had been in that suit, by way of renewal of an earlier kanom the term of which had not expired, was not binding on the tarwad except on proof of necessity or benefit to the tarwad of which proof was lacking. *Chowkaran Kunhi Pocker* v. *Chowkaran Malikaimal Valia Bappotty*[7] is a case in which a junior member of a tarwad successfully sued to recover properties for which a kanom had been given, but it was a case in which the kanom had been granted by a previous karnavan. The plaintiff in that case had obtained permission to sue on behalf of all the members. In *Koppassa Menon* v. *Kalliani Ammal*[8] the senior anandravan brought a suit to set aside a kanom that had been renewed prematurely by the karnavan in office who was a defendant, and lost the suit not because he had no right to maintain it but because it was held that in the circumstances the renewal was proper.

It would thus appear that a junior member of a tarwad may bring a suit to set aside even a kanom that has been executed by a karnavan who is still in office; but that he can only do so in exceptional circumstances is shown by the decision in *Ottaparakkal Thazhath Soopi* v. *Charichal Pallikkal Mariyamma.*[9] There it was held that except in very special circumstances where the karnavan is proved to be guilty of gross misconduct and collusion, it is not competent to the junior members of the tarwad to sue for redemption of a kanom granted by their karnavan.

Bikutti v. *Kalendan*[10] deals with a case of a deed of gift and holds that junior members of a tarwad could bring a suit for the cancellation of such a deed, but this was in exceptional circumstances in that the karnavan, who was defendant 1, could not maintain the deed in that it had been granted by himself.

P. P. Kunhamod Hajee v. *P. P. Kuttiath Hajee*[11] indicates what is an appropriate remedy in the event of a grossly improper lease being granted by the karnavan in office, what it finds being.

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6 (1918) 36 M.L.J. 630
7. (1919) 37 M.L.J. 544
8 (1923) 45 M.L.J. 258
9. (1919) 38 M.L.J. 207.
10 (1890) I.L.R. 14 M 267: 1 M.L.J. 227
11. (1881) I.L.R. 3 M. 169.

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that the grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of the tarwad were persistently disregarded, is sufficient ground for removing the karnavan from the management of the tarwad property. That this is an appropriate remedy is also indicated in *Abdulla Koya* v. *Eacharan Nair*[1] to which reference has been made in para. 3 above. No case has been shown to us in which a suit has been brought successfully by a junior member of a tarwad against his karnavan, praying for such relief as has been granted to the plaintiff in respect of such an ordinary act of management as the granting of a twelve-year kuzhikanom lease. Our attention has been called to *Chappan* v. *Raru*[12] in which it has been remarked that the property of a tarwad is vested in its members, who, when the karnavan makes an alienation that is not binding on them, can sue to recover possession and may do so on their title without even asking for the alienation to be set aside, it being for the alienee to prove that the alienation was binding on them. That, however, was a case in which the alienation by the karnavan was by way of a mortgage. The case for the plaintiff 1st respondent in this connection receives most assistance from some remarks of Jackson, J., in *Manavadan* v. *Sredevi*.[13] In his judgment in that case the learned Judge has stated that the rights of the junior members of a tarwad are confined to suing for maintenance, to suing for cancellation of any transaction entered into by the karnavan to the detriment of the family and to suing for his removal. The junior members sued in that case for the removal of the karnavati on allegations of fraud and misappropriation of family funds and it was held that they could not as a matter of right, when suing for such relief, ask for the karnavati to render general accounts. As a matter of fact the karnavati, a woman, ceased in the course of the suit to occupy her position as such because by the rule of family succession she moved to a higher sphere. In such circumstances it was found that the plaintiffs had no cause of action. They were entitled to sue for a decree removing defendant 1 from management and to contend that, if she gave no account by way of rebutter of their proved allegations, such a decree should be granted and defendant 1 should be removed. As, however, the removal was already an accomplished fact such a contention would be idle. The judgment then goes on to remark that the plaintiffs

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1. (1917) 35 M.L.J. 405. 12 (1912) I.L.R. 37 M. 420.
13. (1926) I.L.R. 50 M. 431: 52 M.L.J. 277.

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might have brought their suit in a different way, that each proved defalcation might be set aside and defendant 1 held liable. These remarks, however, as to the kind of suits which junior members of a tarwad are entitled to bring, are by the way and have no bearing on the point which the case actually decided and, in any case, they have to be considered along with what has been laid down in the other decisions to which reference has been made already. These make it clear that when the alienation which is attacked as fraudulent, improper or to the detriment of the tarwad does not amount to more than a lease, a suit to set it aside can only be brought in exceptional circumstances. It is unnecessary in this particular case to say more than this, apart from reiterating that no precedent has been shown to us for such a relief as has been granted in this suit, in a suit framed as this has been, as we are satisfied that in this case no circumstances have been shown to exist which would justify its being regarded as one in which the plaintiff is entitled to exceptional treatment.

[His Lordship dealt with the evidence and continued.]

We come, then, to the question of rental in which connection the learned Subordinate Judge has taken largely into consideration the reports of two Commissioners, both of whom have reported on the probable yield of the suit lands.

We have in the first place to remark that the Lower Court should not have issued two separate commissions to deal with one and the same subject and to treat the reports of both the Commissioners as evidence in the case. The exact circumstances in which he came to issue the second commission do not appear from the record that has been placed before us, but the second commission should not have been issued, unless it was thought that the report of the first Commissioner was not satisfactory in which case the earlier commission should have been wiped out altogether and attention should have been paid only to what was reported by the second Commissioner. Instead of this the learned Subordinate Judge has balanced the report of one Commissioner against that of the other and has expressed a preference for the views of the first Commissioner. In taking this course he has acted with great impropriety and contrary to what is contemplated by O. 26, R. 10 (3) of the Civil Procedure Code. Though the practice which he has adopted may be one that is prevalent in Malabar it is one that should no longer be continued as has been pointed out in clear terms by this Court in *Ambi v. Kunhi Kavamma.*[14]

14. (1929) 118 I.C. 296.

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[His Lordship then examined the evidence and held that there was no evidence to justify the finding of the Lower Court about the inadequacy of the rent fixed under Exhibit VI and concluded as follows:]

The result, then, is that the appeal succeeds. The decree of the Lower Court is reversed and the suit is dismissed with costs to the defendants 1, 2 and 3 in this Court and in the Court of first instance.

S.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

The Municipal Council, Trichinopoly, represented by its Chairman .. *Appellant** (*Deft.*)

v.

S. Venkatarama Aiyar .. *Respondent* (*Plff.*).

The Municipal Council, Trichinopoly v. Venkatarama Aiyar.

Madras District Municipalities Act (*IV of* 1884), *S* 63 (1) (*a*)—"*Public purposes*"—*Building used for educational purposes—School run by Head-master as proprietary concern—Exemption from assessment to property tax—Madras District Municipalities Act* (*V of* 1920), *S.* 83 (*a*)

A building was used as a secondary school which, though open to the public for the purpose of imparting education, was run as a proprietary concern by the Headmaster of the school who was entitled to appropriate for himself all the profits arising from the school after meeting the expenses of management. A question having been raised whether the building was liable to be assessed by the Municipality to property tax,

Held, that the building was used for "public purposes" within the meaning of S. 63 (1) (*a*) of the Madras District Municipalities Act (IV of 1884) and was consequently exempt from assessment to property tax

Held, further, that the building was similarly exempt from assessment to property tax under the Madras District Municipalities Act (V of 1920) because it was "used for educational purposes" within the meaning of S 83 (*a*) The words "which are open to the public and from which income is derived" in S. 83 (*a*) are referable only to "libraries and playgrounds" and not to "buildings used for educational purposes"

Meaning of the term "public purposes" discussed

Mayor, etc, of Essenden v. *Blackwood,* (1877) 2 A C 574 and *Hamabai* v *Secretary of State,* (1911) 13 Bom L.R. 1097, referred to

Appeal against the decree of the Court of Small Causes, Trichinopoly, in A.S. No. 35 of 1925 (A.S. No. 232 of 1924, District Court, Trichinopoly) preferred against the decree of the Court of the District Munsif of Trichinopoly in O.S. No. 565 of 1922.

P. Venkataramana Rao for appellant.

K. G. Srinivasa Aiyar for respondent.

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*S.A. No. 328 of 1927. 4th August, 1930.

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The Court delivered the following

JUDGMENT.—This second appeal raises the question whether the respondent is exempt from liability to pay "property tax" with respect to a building known as "Arrack Godowns"—a place within the Municipal limits of Trichinopoly—under S. 63 (1) (*a*) of the old Municipal Act (IV of 1884) and S. 83 (*a*) of the present Municipal Act (V of 1920).

The facts are not disputed. The respondent is the proprietor, headmaster and manager of the Aryan Secondary School located in a building known as "Arrack Godowns" at a place called Teppakulam. The appellant is the Municipal Council of Trichinopoly represented by its Chairman. The respondent purchased the building from the Government (*see* Ex. C) for "school purposes only" for the price of Rs. 4,081-4-0. The Municipality assessed "Arrack Godowns" to property tax and realised from the respondent Rs. 297-4-2 for the years 1917 to 1921 by the issue of coercive process. The respondent claimed a refund of the amount from the Municipality on the ground that "Arrack Godowns" is exempt from taxation. The refund being refused, the respondent filed the suit out of which this second appeal arises to recover the amount with interest and also Rs. 1,000 being damages for trespass in execution of the illegal warrant issued to collect the tax in question. The District Munsif awarded the respondent a refund of all the taxes excepting the tax relating to the year 1917 which was disallowed as barred by limitation and also Rs. 500 as damages. This decree was confirmed by the Subordinate Judge. This second appeal has been filed by the Municipality against that decree.

The claim for the refund for the year 1917 does not now arise because the respondent did not file a cross-appeal in the Lower Court against the Munsif's decree disallowing the claim. This second appeal relates only to (1) Rs. 208-10-9, property-tax due for eight half-years collected under the provisions of the old Municipal Act (IV of 1884), and (2) Rs. 58-14-2, property-tax for two half-years collected under the provisions of the present Act (V of 1920) and also to the damages awarded against the Municipality.

I shall first deal with that part of the case which falls under section 63 (1) (*a*) of Act IV of 1884. S. 63 (1) (*a*), (*b*) and (*c*) runs as follows:—

"If the Municipal Council notify, under S 50, that a tax shall be levied on buildings or lands or both in the Municipality, the Chairman shall impose such tax on all buildings or lands, or both, exempting (*a*) light-

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houses, piers, wharves, jetties, choultries, hospitals, dispensaries and other buildings or lands, to the extent to which they are used for public, charitable or religious, but not residential purposes, (*b*) burial and burning grounds, and (*c*) buildings or lands belonging to the Municipal Council."

Under this section if the Municipality issues a notification under S. 50 of the Act it has the power to levy a tax on buildings or lands or both within the Municipality (referred to as property-tax in the subsequent Act, that is Act V of 1920) unless the buildings or lands fall within the exceptions mentioned in clauses (*a*), (*b*) and (*c*). The respondent claimed exemption from the tax on "Arrack Godowns" under clause (*a*) on the ground that the building is used for "public, charitable purposes" as it was used for education which is a public and also a charitable purpose. The argument of the respondent that the purpose is also charitable and on that ground also the building was exempt from liability to pay the tax was overruled by both the Lower Courts. In this Court he has tried to support the decree also on the ground that the building should be considered as being used for charitable purposes also. In the view that I take of the case it will not be necessary to deal with this part of the argument.

The main question for consideration is whether the building, having regard to the facts of the case, can be said to be used for public purposes in the sense in which that expression is used in the Act. It is not denied by the appellant's learned advocate that the school, inasmuch as it is open to all the public and it imparts education, is used for a public purpose; but his argument is that unless the building is used *exclusively* for public purposes, it does not come within the term "public purposes" as used in the section. In this case it is admitted that the appellant is entitled to appropriate for himself all the profits arising from the school after meeting the expenses of the management, salaries of teachers, etc., though he says in his evidence that there has been no profit all these years. It is argued that if the respondent makes profits for himself out of the institution, then though the purpose served by it is a public one, it cannot be said to be used for "public purposes." Various cases, English and Indian, were brought to my notice by both sides, but I do not propose to discuss them in detail as in my opinion the decision of the question should largely depend on the special facts of each case. The term "public purposes" has not been defined in the Act. As pointed out in *Hamabai* v. *Secretary of State*,[1] in English decisions interpretations of the term "public

1. (1911) 13 Bom. L.R. 1097 at 1111.

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purposes" are not uniform and it is difficult to extract any general principle from them applicable to all cases alike. Mr. Venkataramana Rao relied on *The Queen* v. *The Blackfriars' Bridge Company*[2] and *The Queen* v. *The Harrogate Commissioners*[3] to show that in England in order to justify exemption from rateability under the Poor Relief Act, 43 and 44 Elizabeth, Ch. II, Ss. 1 and 2, the claimant had to show that the building or land in question was used *exclusively* for a public purpose. I may observe—and this has been pointed out in the English decisions—that the exemption is not mentioned in the Act but it came to be recognised as a result of the decisions of Courts. These decisions, however useful they are in understanding the meaning of the term in a general sense, do not interpret the expression as used in any enactment. The strongest case relied on by the appellant is one reported in *Mayor, etc., of Essenden* v. *Blackwood*.[4] In that case which related to exemption from rateability of a racecourse held by the respondent therein in trust for a racing club, it was held that the land could not be said to be "used for public purposes" within the meaning of S. 253 of the Victoria Local Government Act (1874) unless it was issued exclusively for public purposes. The facts of that case showed that

"there was on the part of the club, according to the true construction of their Act, a beneficial enjoyment of the land beyond that of the general public, and a pecuniary interest in the surplus, rents, and profits of the racecourse, after providing for its maintenance and use" (*see* the headnote)

On the strength of this decision it is argued that inasmuch as the respondent in this case derives profits from the school, though the public is benefited by it as a place of education, the building cannot be said to be used for a public purpose. This decision no doubt supports the appellant; but I am not quite sure whether the decision can be said to lay down a general test for the interpretation of the term "public purposes" applicable to all cases. The building in the case before us is used as a school for educational purposes, whereas the land in the case mentioned was used as a racecourse. It is difficult to say whether the learned Judges in *Mayor, etc., of Essenden* v. *Blackwood*[4] would have applied the same considerations to the case if the land in it was devoted for quite a different purpose. In this connection attention may be drawn to the often quoted

2 (1839) 9 Ad & E. 828: 112 E R. 1428
3 (1850) 15 Q.B 1012: 117 E.R. 741
4 (1877) 2 A C. 574.

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observations of the Earl of Halsbury, Lord Chancellor, in *Quinn* v. *Leathem.*[5]

"There are," said His Lordship, "two observations which I wish to make, and one is . . that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found The other is that a case is only an authority for what it actually decides I entirely deny that it can be quoted for a proposition that may seem to follow logically from it"

Obviously there is no logical connection between the public purpose in the present case and the public purpose decided in *Mayor, etc. of Essenden* v. *Blackwood*[4] under the Local Government Act in Victoria. In my opinion the decision in *Mayor, etc., of Essenden* v. *Blackwood*[4] should not be applied in deciding this case.

The respondent relies on the decision in *Hamabai* v. *Secretary of State*[1] in which it was held that resumption by the Government "to provide accommodation for Government officers" of land leased to a lessee fell within the meaning of the expression "public purpose" as used in the contract between the parties to that suit. This decision was upheld on appeal by the Privy Council in *Hamabai Framjee* v. *Secretary of State for India in Council* and *Moosa Hajee* v. *Secretary of State for India.*[6] As I have already said the Municipal Act does not define the expression and there are no decisions of this Court on the point. It does not seem to me that the Legislature, when it intended to exempt from rateability buildings used for imparting education which is admitted to be a public purpose, intended to exclude only those institutions from which the headmaster derived no profits for himself. If that was the intention of the Legislature that would have been explicitly so stated. Under the present Act, Act V of 1920, as I shall presently show, when I deal with S. 83 of that Act, it is clear to my mind that the Legislature exempts from rateability all educational institutions irrespective of the question whether the proprietor makes out of those institutions any private profit for himself or not. In the same way, I think all buildings used for educational purposes were intended to be exempted from payment of the Municipal tax under S. 63 (1) (*a*) also. I find from the evidence of Moulana Syed Murtuza Sahib Bahadur, M.L.A., P.W. 5 in this case, that institutions similar to this in the same Municipality, namely, the St. Joseph's College, the National College, Bishop Heber College and

1 (1911) 13 Bom L.R. 1097 4. (1877) 2 A C. 574
5. (1901) A.C. 495 at 506
6 (1914) L.R. 42 I A. 44: I.L.R 39 B. 279: 28 M.L.J. 179 (P C).

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School, the Hindu Secondary School and the Islamia Secondary School during the days it was in his management, were enjoying exemption and were not made to pay any property tax. I am referring to this evidence only to show how in applying this section, the intention of the Legislature was generally interpreted by the Municipality. I am unable to uphold the argument of the appellant on this point. In this view it is not necessary to discuss the question whether the school carried on in "Arrack Godowns" comes within the description of charitable institutions and can claim on that ground exemption from rateability. In my opinion the tax collected under Act IV of 1884 from the respondent was rightly ordered to be refunded by the Lower Courts.

Coming now to the propriety of the collection of the tax of Rs. 58-14-2 under Act V of 1920 we have to construe cl. (*a*) of S. 83 of that Act which says that the following buildings and lands shall be exempt from property tax:—

"Places set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes and libraries and playgrounds which are open to the public and from which no income is derived"

It will be observed that under this Act all the exemptions are grouped together in a separate section. It is argued by the learned advocate for the appellant, in cl. (*a*) the descriptive clause "which are open to the public and from which no income is derived" applies to buildings used for educational purposes and libraries and playgrounds alike and since income is derived from "Arrack Godowns" the building does not fall within the exception and is clearly subject to property tax. I cannot agree with this construction of the clause. If this is the correct sense in which that part of the clause should be understood then I can find no justification for the use of the word "and" between "purposes" and "libraries." If the Legislature wanted to interpret that part of the cl. (*a*) in the sense contended for by the appellant's learned advocate then the first "and" between "purposes and libraries" would have been dropped retaining only the "and" between "libraries and playgrounds"; but that has not been done. In my opinion the words in sub-sec. (*a*) "which are open to the public and from which no income is derived" are referable according to the natural construction of the words only to "libraries and playgrounds" and not to buildings used for educational purposes It is therefore clear under S. 83 of the present Act that "Arrack Godowns" is exempt from property-tax on the ground that it is a building used for educational

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purposes even though the proprietor of it makes profit out of the school which he carries on in that building. I would therefore hold that this sum of Rs. 58-14-2 also was rightly ordered to be refunded by the Lower Courts.

The next question relates to damages. In awarding damages the Lower Courts have considered the conduct of the Municipality and the circumstances relating to the collection of the tax. The concurrent findings of the Lower Courts as regards the liability to pay damages and the amount are based on the evidence in the case. I do not see sufficient reason to interfere with the findings of the Lower Courts on these points.

In the result the second appeal is dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

A. K. Kannayya Chetty and others .. *Petitioners* (Accused)*

v.

The President, Union Board, Tirukoilur .. *Respondent in all petitions (Complainant in all the cases).*

Kannayya Chetty v. The President, Union Board, Tirukoilur.

Madras Local Boards Act (XIV of 1920), S. 3 (18), "Public road"—Madras Local Boards Act (IV of 1884), S 3 (23), "Street"—Madras Local Boards Amendment Act (VI of 1900), "Road"—Marginal space belonging to Government, if a part of public road

The definitions of the word "street" in the Act of 1884, "road" in the Amending Act of 1900 and "public road" in the Act of 1920—all convey the same idea—of a road or other way over which the public have a right of way and all of them include the marginal spaces on either side between the actual roadway and the adjacent property. There is nothing in the alteration of the definition to suggest that it excludes a road margin belonging to the Government which might have been included in it under the older Act Under both Acts, the real question is whether the disputed Government property is really adjacent to the road and not a part of the road in the sense of being used or treated or intended to be used or treated as part of the road

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Sub-divisional Magistrate of Tirukoilur in C.A. Nos. 28, 29, 31, 30 and 27 of 1929 preferred against the judgments of the Court of the Stationary 2nd Class Magistrate of Tirukoilur in C.C. Nos. 160, 157, 162, 156 and 161 of 1929.

M. S. Venkatarama Aiyar, B. Somayya for *C. Vasudevan, V. L. Ethiraj* and *N. Somasundaram* for petitioners.

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*Cr Rev Case Nos 852, 853, 896, 914 and 932 of 1929 10th Sept 1930.
(Cr. Rev. Petitions Nos. 763, 764, 804, 821 and 839 of 1929)

S. Jagadisa Aiyar and *R. Srinivasa Aiyar* for respondents.

P. Govinda Menon for *The Public Prosecutor* on behalf of the Crown in all the cases.

The Court made the following

ORDER.—The petitioners in these cases are owners or occupiers of houses in the southern row of a street called South Car Street in Tirukoilur Union. They and some other house owners who have not applied to this Court were convicted by the Stationary 2nd Class Magistrate, Tirukoilur, which conviction was affirmed on appeal to the Sub-divisional Magistrate, Tirukoilur, under section 207 (1) (*a*) of the Local Boards Act for failure to remove encroachments into the street in front of their several premises consisting of thatched roofs supported on posts planted in the ground. The common defence of all the petitioners was that the roofs were not encroachments, because the strip of land occupied by them which is at the southern margin of the road was not part of the road but Government land under which there was a water channel called Theppakulam Channel covered by stone slabs laid across the top. This defence was rejected by both the Courts below who found that though the Theppakulam Channel which has been out of use for several years and the stone coverings to it belong to Government, the surface is part of the "road" according to the definition in the Local Boards Act and vests in the Union Board. It was proved that the site of the channel was surveyed as part of the road in 1920 to which no objection was then taken by any of the adjacent house owners, and that in 1915, when proceedings under the Land Encroachment Act for levying penal assessment against the petitioner in Cr. Rev. Case No. 932 were taken, the Collector while excusing the levy ordered by the Tahsildar and permitting the continuance of the encroaching roof so long as the owner did not interfere with the repairs of the channel made it quite clear, which that petitioner admitted, that the site belonged to Government liable to assessment under the Act. On these findings the petitioners were convicted and fined Rs. 25 each.

In this Court the advocate for the petitioners has advanced the argument that the definition of "public road" in the Local Boards Act, 1920, is different from that of "Road," "Public road" in Act VI of 1900 which itself amended the original definition of "Street" and "Public street" in the Act of 1884. It was contended that the result of this change of definition is that though the site of the Theppakulam Channel with its covering may have been part of the road or street according to the older definition,

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yet the present definition excludes it from the road, as it has become "the adjacent property" belonging to Government. This is the main question in these cases.

The present Local Boards Act came into force on 1st April, 1921, till when the former Act of 1884 as amended in 1900 was in force. According to section 235 of the Act of 1920 all property, rights and interests of whatever kind owned by or vested in a Local Board as constituted under the old Act, passed to the corresponding Local Board constituted under the new Act. If, therefore, the site of the Theppakulam Channel could be shown to have formed part of a public road under the old Act, it would necessarily form part of the same road under the new Act unless indeed there were something in the new Act (*e.g.*, the definition of public road) which necessarily excludes it therefrom in spite of section 235. A comparison of the old definition of "road" and "street" with the new definition of "public road" does not support the petitioner's contention. "Road" in the Act of 1884 as amended in 1900 includes

"any road, street, square, court, alley or passage, whether a thoroughfare or not, over which the public has a right of way, together with the drains on either side and with the land, whether covered or not by any pavement, verandah or other erection, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property be private property or property reserved by Government for other purposes, and also includes the roadway over any public bridge or causeway"

"Public road" in the same Act means

"any road which is now vested in a local board or which may hereafter be made at the cost of the local fund or which may hereafter be declared under section 53 to be a public road"

The idea contained in the above definition of including in a road the marginal land between the roadway and the adjacent property was continued from the still older definition of "street" in the Act of 1884 as originally passed as

"any road, street, square, court, alley or passage, whether a thoroughfare or not, over which the public has a right of way, together with the land (not being private property) whether covered or not by any pavement, verandah, or other erection, which lies between the roadway and the main wall of any house adjacent thereto and also the roadway over any public bridge or causeway"

Similarly, "public street" in the Act of 1884 as originally passed meant

"any street which now is a public street or may hereafter be declared to be a public street in manner hereinafter provided"

In the Act of 1920 "public road" means

"any street, road, square, court, alley, passage or riding-path, whether a thoroughfare or not, over which the public have a right of way and includes

(a) the roadway over any public bridge or causeway;

(*b*) the footway attached to any such road, public bridge or causeway, and

(*c*) the drains attached to any such road, public bridge or causeway, and the land, whether covered or not by any pavement, verandah or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property is private property or property belonging to Government."

In the same Act "private road" means

"any street, road, square, court, alley, passage or riding-path which is not a 'public road' but does not include a pathway made by the owner of premises on his own land to secure access to, or the convenient use of, such premises"

From the above it is clear that in the Acts of 1884 and the Amending Act of 1900 there was no definition of private street or private road and that the word "street" in 1884 and "road" in 1900 were defined as connoting all the attributes of a public street or road. The expression "public street" for which therefore there was no necessity for a fresh definition in 1884 was declared to mean streets which were then or were declared afterwards to be public. Similarly the substituted expression "public road" for which there was no necessity for a fresh definition in 1900 was declared to mean roads which were then vested in the Local Board or were afterwards made at the cost of the Local Fund or afterwards declared to be public. The amendments of 1920 were, so far as the present matter goes, not of substance but of arrangement and merely verbal. The definition of "public road" of 1920 corresponds to "street" in 1884 and to that of "road" in 1900. Through all of them the same idea runs—of a road or other way over which the public have a right of way—and all of them include the marginal spaces on either side between the actual roadway and the adjacent property. It is only in describing the limit of the adjacent property that some alteration of language has occurred. In 1884 the limit was described as the main wall of any adjacent house. This left out cases where there was no house adjacent. Therefore in 1900 the limit was described as the boundary of the adjacent property whether it be private property or property reserved by Government for other purposes. This language seemed liable to the interpretation that unless Government property adjacent to a road were "reserved" for some other purpose than a road, it would come within the definition of "road." Of very few properties can it be properly said that they are reserved by the owner for any purpose. If they are Government property, they may be used for any purpose at the pleasure of Government any previous reservation notwithstanding. Therefore, the definition was too wide and the limit of the adjacent property really

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illusory. This was corrected in 1920 by omitting the words as to reservation by Government and we have now as the limit of a public road boundaries of the adjacent property whether it be private property or Government property.

There is nothing in the alteration of the language of the definition of public road in the Act of 1920 which supports the petitioner's argument that it excludes a road margin belonging to the Government which might have been included in it under the older Act. Under both Acts the real question is whether the disputed Government property is really only adjacent to the road and not a part of the road in the sense of being used or treated or intended to be used or treated as part of the road. So far as the present cases are concerned the findings of the Courts leave no room for doubt in the matter. The Thoppakulam Channel which has for many years been out of use and which runs underground along the southern margin of the South Street is undoubtedly Government property. In 1915 the petitioner in 932 was assessed to penal assessment under the Land Encroachment Act for keeping the overhanging roof. The Collector excused the assessment and allowed the roof to remain but on condition that the owner did not interfere with the repairs to the channel. By section 2 (2) of the Land Encroachment Act all public roads, streets, vested in a local authority are Government property within the meaning of that section. By the proviso to section 3 payment of penal assessment does not confer any right of occupancy in the unauthorised occupant. Nor can the fact that the Collector did not then consider it necessary to levy the assessment or to evict the occupant affect in any manner his liability to action under sections 98 and 98-A of the Local Boards Act (1884) as amended in 1900 which was then in force. In May, 1920, the street in question was surveyed. In the survey plan the Thoppakulam Channel is not separately demarcated as a different Government property but is included in the width of the street. No question or objection was raised by Government or any one else as to this and it is idle for petitioners now to contend that the width of the road does not include the width of the channel and that the latter is a separate property adjacent to, but not forming part of the road. I have no doubt that on the evidence before the Lower Courts they were right in concluding that the space over which the petitioners have erected the roofs is part of a public road and that the roofs were therefore encroachments.

The petitions are dismissed.

S.R. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Vatakee Neelamana Illoth Iswaran Nambudiri and others .. *Appellants** (*Defts.*)

v.

Vatakee Neelamana Illoth Vishnu Nambudiri and others .. *Respondents* (*Plffs.*).

Iswaran Nambudiri *v.* Vishnu Nambudiri.

Malabar Law—Tarwad—Property in the possession of junior member—Presumption of Hindu Law—Applicability

The rule of Hindu Law that if nothing appears in the case except that a member of a joint family is in possession of property the burden of proving self-acquisition lies on such person, applies to property acquired by a junior member of a Malabar tarwad during the course of his *de facto* management If such person is not shown to have had private funds of his own enabling him to acquire the property, the presumption is that such property belongs to the tarwad

Chathu Nair v. *Sekaran Nair*, (1909) I.L R. 33 M. 250· 20 M L J. 86, followed

Govinda Panikker v *Nani*, (1911) I.L.R. 36 M 304, referred to.

Second Appeal against the decree of the District Court of North Malabar in A.S. No. 393 of 1925 preferred against the decree of the Court of the District Munsif of Cannanore in O.S. No. 462 of 1924 (O.S. No. 701 of 1923, District Munsif's Court, Taliparamba).

P. Govinda Menon for appellants.

O. T. Govindan Nambiar for respondents.

The Court delivered the following

JUDGMENT.—Defendants 6 to 9 and 13 are the appellants. This second appeal arises out of a suit brought by the plaintiff who is a junior member in a Nambudiri Illom for the recovery of a certain sum of money alleged to be due as arrears of maintenance In deciding the matters relating to the plaintiff's claim for maintenance, it became necessary to decide whether certain properties covered by Ex. XIV should also be treated as the properties of the tarwad for the purpose of determining the proper amount of the maintenance awardable to plaintiff. There is no doubt that these properties were purchased in the name of the 1st defendant when he was a junior member of the illom and during the period of his father's term of Karnavanship. Some time after the acquisition, these properties were gifted by the 1st defendant to his sons, the present defendants 6 to 9. On

*S.A. No. 1521 of 1927. 13th November, 1930.

Iswaran Nambudiri v. Vishnu Nambudiri.

the plaintiff's side it is contended that these properties, though they were purchased in the name of the 1st defendant, are really the properties of the tarwad, whereas on behalf of the defendants 6 to 9, it is contended, that they were the self-acquisitions of the 1st defendant. The learned District Judge has found that the properties in question are the properties of the tarwad and as such should be taken into consideration for determining the amount of maintenance due to the plaintiff. As against this finding the present second appeal has been filed.

It is argued, on behalf of the appellants, that the lower appellate Court was not correct in applying to the present case the rules of presumption applicable to an ordinary joint Hindu family, and on account of the erroneous view taken by that Court in the matter of applying the presumption of law, the finding should be deemed to be vitiated. The question for consideration is, whether in the case of a tarwad, the presumption is just like the one applied to an ordinary Hindu family or whether there is any special presumption which should be applied to an acquisition made in the name of a junior member of a tarwad, so as to throw the burden of proof on the party who sets up that it is tarwad property. It is true that there are some vital differences between a Malabar tarwad and an ordinary joint Hindu family in certain respects, that is, as regards impartibility and inalienability. Though a junior in a tarwad cannot claim partition and separation of his share, he is still entitled to joint enjoyment of the tarwad property, subject of course to some well-known restrictions. As regards the pious obligation of the son to discharge the debt of his father even out of his share of the joint family, which, of course, exists in an ordinary joint Hindu family, it has been held that such an obligation does not exist in the case of a son of any member of the tarwad. Vide *Kunhu Kutti Ammah* v. *Mallapratu*.[1] In view of the incidents appertaining to a joint Hindu family and those relating to a tarwad, it seems to me that it may not be quite correct to apply the presumption that will hold good in the case of a joint Hindu family, without any reservation, to a Malabar tarwad. I at first thought that in the case of an acquisition by a junior member of a Malabar tarwad, the presumption as to self-acquisition would be a little stronger than in the case of an ordinary Hindu family. But the decision in *Mari Veetil Chathu Nair* v *Mari Veetil Mulamparol Sekaram Nair*[2] lays down that the rule of

1 (1913) I.L R. 38 M. 527.
2 (1909) I.L.R. 33 M. 250: 20 M.L.J. 86

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Hindu Law, that if nothing appears in the case except that a member of the joint family is in possession of property, the burden of proving self-acquisition lies on such person applies also to property in the possession of a junior member of a tarwad. It is stated that this rule has been applied in certain earlier decisions of this Court, namely, *Vira Rayen* v. *Valia Rani of Pudia Kovilagom, Calicut*[3] and two other unreported decisions The well-recognised principle of Hindu Law applicable to joint Hindu families has been early applied to a Malabar tarwad also in *Mari Veetil Chathu Nair* v. *Mari Veetil Mulamparol Sekaran Nair*[2] But, in the decision in *Govinda Panikker* v. *Nani*,[4] the learned Judges, while observing that the presumption of law laid down in *Vira Rayen* v. *Valia Rani of Pudia Kovilagom, Calicut*[3] and two other unreported cases is to the above effect, state that they do not, however, understand those cases as laying down that there is any presumption of law either way. They explain the position in the subsequent passage which is as follows:—

"The presumption is one of fact, *see* Mayne's Hindu Law, paragraphs 289 to 291, and whether a presumption in favour of the property being tarwad property should be drawn or not in any particular case would depend on various circumstances, such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the acquisition, and any other facts that may throw light on the source of the money used for the acquisition."

According to this decision, much importance is not attached to the abstract question of law, "On whom does the burden of proof lies?" but the facts that are admitted or proved in a particular case should be mainly taken into account in order to apply the rule of law as to presumption. In a later decision in *Subramania Pattar* v. *Krishna Embranderi*[5] Sadasiva Aiyar, J., refers to the decision in *Govinda Panikker* v. *Nani*[4] and also to the decision in *Dharmu Shetti* v. *Dejamma*[6] as authorities for the view that there is no presumption either way. The learned Judge observes that if there is no presumption either way, the plaintiffs coming into Court should prove the facts which would show that their contention is true. An opinion is expressed, that as regards the Malabar tarwad, the presumption should be against the tarwad. But this view, as I have stated,

2. (1909) I.L.R. 33 M 250. 20 M.L.J. 86
3 (1881) I.L.R 3 M. 141 4 (1911) I.L.R. 36 M. 304.
5. (1920) 39 M L.J. 590 6 (1916) 5 L.W. 259.

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above, runs counter to what is expressed in *Mari Veetil Chathu Nair* v. *Mari Veetil Mulamparol Sekaran Nair*[2] and also in the three earlier cases referred to therein. The general trend of all these cases does not negative the application to a tarwad, of the rule of Hindu Law as to a joint Hindu family, in the matter of deciding whether a particular item of property claimed to be the self-acquisition of one member thereof is really his self-acquisition or the property of the family. That being so, the main argument of the learned advocate for the appellants that the Lower Appellate Court was wrong in applying the ordinary rule of Hindu Law to the present case cannot be accepted as correct. In my opinion, the view expressed in *Govinda Panikker* v. *Nani*[4] can be safely followed in deciding questions of this kind.

Now we must see what the outstanding facts established in this case are. As found by the learned District Judge, the 1st defendant was in actual management of the affairs of the illom under his father who was too old to take any part in the effectual management of the family. It is true that the 1st defendant did not possess any power of attorney or *mukhtearnama* to entitle him to manage the family affairs. But still he was in *de facto* management of the affairs though not in his own right but under his aged father. Moreover, the acquisitions in question were all made by the 1st defendant during the period of such management. Even granting that if nothing is known, we should say that there is no presumption either way, the aforesaid facts which have been found to be true in the present case give rise to a presumption in favour of the plaintiff's contention that these properties should have been acquired with the funds of the tarwad. Whether this presumption is strong or slight, it is still perfectly open to the defendants to rebut that presumption in any manner. Whether they have rebutted or not has also been considered by the learned District Judge. Taking the evidence into consideration, he disbelieves the 1st defendant's version that he had some private funds with which he made these acquisitions That finding is one of fact and based upon the evidence in the case. The only effectual way of rebutting the aforesaid presumption would be by showing that the 1st defendant had some private funds of his own to enable him to acquire these properties. That proof not having been adduced, the District Judge is right in saying that the presumption has not been rebutted.

2 (1909) I.L.R. 33 M 250: 20 M.L.J. 86
4. (1911) I.L.R. 36 M. 304.

In the present case, there is no basis for attacking the finding of the learned District Judge as due to an erroneous application of a presumption of law. I therefore hold that his finding is correct and should be accepted.

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In the result, the second appeal fails and is dismissed with costs.

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Ramanuja Naicker .. *Appellant** (*1st Counter-petitioner*)

v.

Solaiappa Naicker and others .. *Respondents* (*Petitioners and Counter-petitioners Nos. 2 to 7*).

Ramanuja Naicker v. Solaiappa Naicker.

Civil Procedure Code (*V of* 1908), *S.* 47 (2)—*Money decree-holder, purchaser of some properties of the judgment-debtor—Application by him to set aside sale of the same properties under a mortgage decree obtained against the same debtor—Material irregularity and previous satisfaction of the mortgage-debt alleged—Not proved—Another application to treat the second ground as a suit—Dismissal of both the applications—Appeal against the order in the previous application—Appellate Court granting the conversion of the second application into a suit—Jurisdiction.*

The appellant was the purchaser of 17 properties in a mortgage suit at a sale. The 1st respondent was the purchaser of 7 of those properties under a previous Court sale for a simple money debt. The 1st respondent applied to the Court executing the mortgage decree to set aside the sale to the appellant, alleging (1) that material irregularity was effected in the conduct and publication of the sale, and (2) that the preliminary decree had been previously satisfied and that the subsequent acts were done fraudulently with a view to defeating the respondent's rights. Being advised that his latter objection could not be heard in execution, the 1st respondent applied by another petition to treat the second ground of his former application as a suit under section 47 (2). The Subordinate Judge dismissed the second petition on the 5th September, 1924. On the 7th October, 1924, the other previous application was also dismissed in so far as it alleged material irregularity, on the ground of its not being proved. The 1st respondent appealed against the order in the previous application and the District Judge, though aware of the fact that there was no appeal against the order of the 5th September, granted permission to convert the second application into a suit.

Held, that the decree in so far as it directed the conversion of the petition dismissed on the 5th September into a suit was wrong, as there could be no appeal from it and as the Lower Appellate Court Judge had no power of revision and in any case he should not have interfered with the order of the Subordinate Judge of the 5th September, nor was it a case in which he ought to have, of his own accord, made an order under section 47 (2).

The sub-section is intended to prevent the inconvenience and injustice caused by the discovery sometimes made after proceedings in Court have gone on for a long time or as a result of the decision of an Appellate Court

*A.A.A.O. No. 71 of 1928. 18th November, 1930.

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that the proceeding had originated in an erroneous form by a *bona fide* mistake by petition when it should have been by suit or *vice versa*. It is not intended to save litigants from the trouble of choosing the proper form and filing a plaint or an execution petition when it is discovered in time what is the proper form and there is no question about the matter.

Appeal against the order of the District Court of Ramnad at Madura in Appeal Suit No. 697 of 1924 (E.A. No. 90 of 1924 in E.P. No. 120 of 1923 in O.S. No. 68 of 1919 on the file of the Court of the Subordinate Judge of Ramnad at Madura).

K. Rajah Aiyar and *M. Rajagopalachariar* for appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—The appellant assignee decree-holder is the purchaser of 17 properties in a mortgage suit O.S. No. 68 of 1919 at a sale dated 24th March, 1924. The 1st respondent is the purchaser of 7 of these properties under a previous Court sale dated 18th December, 1923, for a simple debt due by the same debtor. The 1st respondent on 16th June, 1924, by E.A. No. 90 of 1924 applied to the Court executing the mortgage decree to set aside the sale to the appellant alleging (1) material irregularity in conducting and publishing the sale, and (2) that the preliminary mortgage decree had been previously satisfied by the mortgagors themselves and that the subsequent assignment of the decree and execution sale were conducted fraudulently in collusion between the assignee decree-holder and judgment-debtors in the mortgage suit in order to defeat the respondent. Apparently, being advised that the latter objection could not be heard in execution, the 1st respondent applied by E. A. No. 138 of 1924 to treat the second ground of his former petition as a suit under section 47 (2). The Subordinate Judge dismissed E.A. No. 138 of 1924 on 5th September, 1924. He refused to treat E.A. No. 90 of 1924 as a suit but left it to the 1st respondent to file a suit if he was so advised on the ground of fraud. On 7th October, 1924, he dismissed E.A. No. 90 of 1924 so far as it alleged material irregularity on the ground that no irregularity in publishing or conducting the sale was proved. The 1st respondent did not pursue the order of 5th September, 1924, in appeal or revision but appealed to the District Court against the order of 7th October, 1924, which he was entitled to do as the order was one relating to the execution, discharge or satisfaction of the decree and according to the decisions both appellant and the 1st respondent are representa-

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tives of the parties to the mortgage-decree. At the hearing of the appeal on 4th February, 1928, the only question which gave rise to the appeal, *i.e.*, whether the sale to the appellant was vitiated by material irregularity in publishing and conducting it, was abandoned by the 1st respondent. But the District Judge was asked to set aside the order of the Sub-Judge, dated 5th September, 1924, refusing to convert the petition into a suit so far as it was founded on fraud. The learned Judge though aware of the fact that there was no appeal from that order and that it was not one relating to execution, discharge or satisfaction of the decree, considered that it was merely an interlocutory matter arising in the main petition which was the subject-matter of appeal and that therefore he had power to order the conversion and holding that the Subordinate Judge had not exercised a sound discretion ordered the conversion of the petition E.A. No. 90 of 1924 into a suit. The present appeal is against that order.

The 1st respondent took the preliminary objection that no appeal lies from an order merely allowing the conversion of an execution petition into a suit as permitted by section 47 (2) of the Civil Procedure Code, for the reason that the order though passed under section 47 is not one relating to the execution, discharge or satisfaction of the decree: *Sonnu Aiyar* v. *Chelliah Pillai.*[1] But the answer is that, the Lower Court having on 1st respondent's own invitation exercised the power to set aside the order of the Subordinate Judge on the footing that it is involved in the appeal under section 47, he cannot now turn round and say that no appeal lies at appellant's instance to correct the error: *Latchmanan Chetty* v. *Ramanathan Chetty.*[2] This objection fails.

I doubt whether the learned Judge had any jurisdiction to set aside the order of 5th September, 1924. There could be no appeal from it and the learned Judge had no power of revision. In any case I think the learned Judge should not have interfered with the order of the Subordinate Judge of 5th September, 1924, nor was it a case in which he ought to have, of his own accord, made an order under section 47 (2). That sub-section is intended to prevent the inconvenience and injustice caused by the discovery sometimes made after proceedings in Court have gone on for a long time or as a result of the decision of an appellate Court that the proceeding had originated in an

1 (1929) 30 L.W 230

2. (1904) I.L R. 28 M 127: 14 M.L.J. 436.

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erroneous form by a *bona fide* mistake by petition when it should have been by suit or *vice versa*. It is not intended to save litigants from the trouble of choosing the proper form and filing a plaint or an execution petition when it is discovered in time what is the proper form and there is no further question about the matter. Here the order of 5th September, 1924, clearly informed the 1st respondent, if it was necessary for that purpose, that so far as his attack on the sale was founded on fraud in obtaining the final decree or in executing a decree which had been satisfied, his proper remedy was by suit. The 1st respondent has not questioned the correctness of that view here and did not question it before the District Judge. He had plenty of time to correct his own error and file a plaint if so advised on the ground of fraud. But he did not do so till the decision of the appeal on 4th February, 1928. That appeal was only concerned with the allegation of material irregularity and not with any allegations of fraud. In the circumstances there was no hardship arising from 1st respondent's failure to file his suit earlier, for which the 1st respondent was alone responsible. It was wrong to say as the learned Judge has done that the Subordinate Judge did not exercise a sound discretion because his decision on the point has never been questioned and is obviously right. The learned Judge seems to have been influenced by the consideration that a suit brought for the first time after 4th February, 1928, on the ground of fraud might be met with a plea of limitation. In the above circumstances the 1st respondent has no one else to thank for this, if it should be so.

The appellant's advocate has urged that it is illegal under section 47 (2) to treat a proceeding partly as a petition and partly as a suit and that the only power given under that subsection is to treat it as one or the other, not as both. He cited *Venkatakumara Mahipati Surya Rao Bahadur* v. *Subbayamma Rao Bahadur*[3] and *Sachi Prasad Mukherjee* v. *Amarnath Roy Chowdhuri*.[4] I think it unnecessary to say anything about this as in my opinion the order under section 47 (2) passed by the District Judge was unjustified on the grounds already stated.

In the result, the decree of the Lower Court so far as it directed the conversion of the 1st respondent's petition into a suit, is set aside. I understand that a suit has been filed by the 1st respondent. This decision will not affect any of the

3 (1914) 1 L.W. 443. 4 (1918) I.L.R. 46 C. 103 at 108.

questions arising for decision in the suit except such as may depend upon conversion by the order of the Court of the petition into a suit. Ramanuja Naicker v. Solaiappa Naicker.

The appellant will have his costs in this and in the Lower Court.

K.C. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Mallappa Chettiar *alias* Rathnasabapathi Chettiar and another .. *Petitioners* (Plffs.)*

v.

Alagiri Naicker and others .. *Respondents (1st Deft. and L.Rs. of 2nd Deft.).*

Civil Procedure Code (V of 1908), Ss 115, 151, *O.* 41, *Rr.* 23, 25, 27 *and* 28—*Inherent power of remand of appellate Court—Extension to cases where specific provisions made under the Code—Material irregularity.* Mallappa Chettiar v. Alagiri Naicker.

The inherent power of remand by the appellate Court, apart from O. 41, R. 23 of the Code of Civil Procedure, does not extend to cases for which specific provision has been made, as for instance under O. 41, Rr. 25, 27 and 28.

Where a lower appellate Court purported to remand a case under its inherent power in cases covered by any one of these rules, it is a material irregularity in the exercise of its jurisdiction by the lower appellate Court, which the High Court can cure by interfering in revision.

Venkamma v. *Goparaju Perraju,* (1928) M.W.N. 164, considered.

Athappa Chetty v. *Ramanatham Chetty,* (1919) 10 L.W. 359: 37 M.L.J. 536 and *Sheikh Muhammad Maracayar* v. *Rengasami Naidu,* (1921) 16 L.W. 515, not followed.

Ghuznavi v. *The Allahabad Bank, Ltd,* (1917) I.L.R. 44 Cal. 929, (F.B.), referred to.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Ramnad at Madura in Appeal No. 282 of 1926 preferred against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O.S. No. 12 of 1926 (O.S. No. 21 of 1922, Sub-Court, Ramnad—O.S. No. 10 of 1924, Additional Sub-Court, Ramnad).

K. V. Sesha Aiyangar for petitioner.

C. A. Seshagiri Sastri and *R. Ramasubba Aiyar* for respondents referred to *Balla Mallayya* v. *Peddi Veerayya,* (1926) 52 M.L.J. 90 and the decisions in C.M.A. No. 232 of 1930 and C.R.P. No. 892 of 1930 in addition to the cases referred to in the judgment.

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*C.R.P. No. 1464 of 1929 28th November, 1930.

Mallappa Chettiar v. Alagiri Naicker.

The Court delivered the following

JUDGMENT.—This is a revision petition against an order of remand passed by Mr. K. S. Ramaswami Sastri, District Judge of Ramnad, on 18th March, 1929, in A.S. No. 282 of 1926.

The learned Judge tabulated three points for decision, and decided them all except that he required a finding from the Lower Court as regards the yellow marked items on the suit map. This of course is provided for in O. 41, Rr. 25 and 27. But the learned Judge has remanded the case "in the exercise of his Court's inherent power." No reason has been suggested for this surprising procedure, and the only reason which can be inferred from the record, that the quarter was closing and the Judge wished to add a disposal to his returns, is one which this Court would be loath to believe.

The question now is whether when the Code contains specific provisions which would meet the necessities of the case in question, such provisions should not be followed, instead of the inherent jurisdiction being invoked.

This point is very fully considered by Anantakrishna Aiyar, J., in *Venkamma* v. *Goparaju Perraju*[1] and his statement of his opinion and of the authorities upon which it is based is one to which I can add nothing but my entire concurrence. In his Lordship's view it is not open to the Court to follow a procedure which is contrary to what the legislature has expressly pointed out to be the proper procedure, as when in O. 41, Rr. 27 and 28 the legislature has given a specific direction.

But after thus stating his view the learned Judge holds that he is overborne by authority. He particularly refers to *Sheikh Muhammad Maracayar* v. *Rengasami Naidu.*[2] I find there that the Judges confessed to feeling the difficulty, but they deferred to *Athappa Chetty* v. *Ramanatham Chetty*[3] and *Ghusnavi* v. *The Allahabad Bank, Ltd.*[4] In *Athappa Chetty* v. *Ramanatham Chetty*[3] it is held that Courts have an inherent power of remand, but "where a power is given expressly, Courts should not exercise their inherent power." For this view *Ghusnavi* v. *The Allahabad Bank, Ltd.*[4] and *Jambulayya* v. *Rajamma*[5] are cited. *Jambulayya* v. *Rajamma*[5] is only authority for what is now generally accepted, that when there has been no regular hearing of the

1. (1928) M.W.N 164
2 (1921) 16 L.W. 515.
3 (1919) 10 L.W. 359: 37 M L.J. 536.
4. (1917) I L.R. 44 Cal 929 (F.B)
5. (1912) I.L.R. 36 M. 492: 24 M.L.J. 512.

matter the appellate Court by its inherent power may remand. *Ghuznavi* v. *The Allahabad Bank, Ltd.*[4] is direct authority for the rule that the inherent power must not be exercised when there is a specific provision in the Code, *see* page 936. The question propounded in this judgment follows the language of that passage.

Therefore it will be seen that *Athappa Chetty* v. *Ramanatham Chetty*[3] which the Judges in *Sheikh Muhammad Maracayar* v. *Rengasami Naidu*[2] thought was authority for permitting the Court to remand when there was a specific provision in O. 41, R. 27, is authority for precisely the contrary view. The mistake has crept in by careless headnoting. The Judges in *Aathappa Chetty* v. *Ramanatham Chetty*[3] said: "Where a power is given expressly, Courts should not exercise their inherent power which ought to be very cautiously indented upon." The headnote changes this to, "where express powers are also given, the Courts should be very cautious in resorting to their inherent powers" (10 L.W. 359). And so "should not" has become "should cautiously." And then when one goes behind *Athappa Chetty* v. *Ramanatham Chetty*[3] to what is undoubtedly the leading case in this matter, the Full Bench Calcutta decision, the headnote is both correct and clear. "Inherent jurisdiction must be exercised with care, subject . . . to the condition that the matter is not one with which the Legislature has so specifically dealt as to preclude the exercise of inherent power."

In this state of the law I feel neither bound by *Sheikh Muhammad Maracayar* v. *Rengasami Naidu*[2] nor constrained to refer the matter to a Full Bench. It would indeed be strange if a Full Bench were assembled to decide whether when there is a clear provision in the Code of Civil Procedure, the Judge by virtue of his inherent power may take up his pen and write a new rule for his personal use. Nor have I any hesitation in finding that the District Judge acted with material irregularity.

The order of remand is cancelled, and the Trial Court is directed to submit a finding to the appellate Court within six weeks of receipt of this order on the issue—What is the value of the yellow marked portions. The appellate Court will then dispose of the appeal.

A further question arises whether fresh evidence should be adduced. It appears that the parties had ample opportunity of

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2. (1921) 16 L.W 515 3 (1919) 10 L W. 359 37 M.L.J. 536
4 (1917) I.L.R. 44 C 929 (F B).

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producing evidence on this point which they undoubtedly knew to be material to the suit, and to call for fresh evidence after this long lapse is only an encouragement to perjury. The District Munsif must confine himself to the present record.

Costs of this Civil Revision Petition will be costs in the cause.

K.C. *Order of remand cancelled.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Moturu Mahalakshmamma and another .. *Appellants** (*Defts.* 1 *and* 2)

v.

Thangirala Bala Thripura Sundaramma and others .. *Respondents* (*Plffs.* 1 *and* 2 *and Defts.* 3 *to* 6).

Mahalakshmamma v. Sundaramma.

Hindu Law—Widow's alienation—Reversioners' suit—Less than half of the consideration alone for binding purposes—Legal effect of the sale—Working out equities.

Where a widow alienated some of the lands of her husband to the defendants in the case and the reversioners (plaintiffs) brought a suit for a declaration that the alienation was not valid and binding, and the Lower Appellate Court came to the conclusion that of the consideration for the sale a portion amounting to Rs 806-10-6 out of Rs. 1,774-8-0 was only binding on the estate and hence the sale ought to be set aside and a charge should be created in favour of the vendees for the portion of the consideration found to be binding, when the reversion opened,

Held that (1) in view of the findings with regard to the necessity of the sale and *bona fides* of the purchasers and the conclusion of the Lower Appellate Court that there would be no difficulty as regards apportioning the land which was subject of the sale in the present case, land of the value of the amount found to be binding on the estate should be given to the defendants *Krishn Das* v. *Nathu Ram*, (1926) L.R. 54 I.A. 79: I.L.R. 49 A. 149. 52 M L J 720 at 724 and 725 (P.C), *Suraj Bhan Singh* v. *Sah Chain Sukh*, (1927) 53 M L J. 300 (P.C.) and *Rukmani Sundarammal* v. *Muthu Ammal*, (1915) M.W.N. 8, referred to, and

(2) that with regard to working out the equities, the proper decree would be, that the ultimate reversioners would be entitled to the lands covered by the sale-deed less the portion to be given to the defendants for the binding portion of the consideration (to be selected and separated by the Court if the parties interested would not then be able to agree) *Baluswami Aiyar* v. *Lakshmana Aiyar*, (1921) I.L.R. 44 Mad 605· 41 M.L.J. 129 (F.B), relied on.

The whole price paid by the defendants under the sale-deed should be taken to be the price of the portion of lands that they would be entitled to.

The question how equities have to be worked out in any particular case would depend on the facts and circumstances of each case.

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*S A. No. 1087 of 1925. 11th November, 1930.

Mahalakshmamma v. Sundaramma

Second Appeal against the decree of the Court of the Subordinate Judge of Guntur, in A.S. No. 40 of 1924 (A.S. No. 252 of 1923, District Court, Guntur) preferred against the decree of the Court of the Additional District Munsif of Guntur in O.S. No. 277 of 1921 (O.S. No. 63 of 1921, 2nd Additional District Munsif's Court, Guntur, O.S. No. 383 of 1920, District Munsif's Court, Repalli at Tenali and O.S. No. 741 of 1920, District Munsif's Court, Tenali).

Ch. Raghava Rao for appellants.

B. Somayya for respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs, who are the daughters of the late Krishnayya, instituted the original suit for a declaration that the alienations made by his widow (3rd defendant) in favour of two sets of defendants, *viz.*, defendants 1 & 2 on the one hand and the 6th defendant on the other, would not be binding on the reversioners after the death of the 3rd defendant. The alienees put in separate written statements supporting their alienations. There was also another question raised whether the 5th defendant was not adopted by the widow and whether the said adoption was valid. The Trial Court found against the adoption. The Trial Court also found against the validity of the alienation under Ex. VI in favour of the 6th defendant; but it found that the alienation in favour of defendants 1 and 2 under Ex. IX, dated 7th May, 1917, was valid and binding, and it accordingly dismissed the plaintiffs' suit against defendants 1 and 2. On appeal by the plaintiffs, the learned Subordinate Judge of Guntur analysed the evidence relating to the various debts which were set up as debts binding upon the estate and discharged by the vendee under Ex. IX. The Lower Appellate Court in paragraph 11 of its judgment set out the several details making up the debt of Rs. 1,774-8-0 mentioned in Ex. IX. The learned Subordinate Judge came to the conclusion that out of that amount only Rs. 673-3-7 was shown to be binding on the estate. He, therefore, came to the conclusion that in the case before him the sale ought to be set aside but that a charge should be created in favour of the vendees for the portion of the consideration found to be binding, when the reversion opened. He accordingly passed a decree substantially to that effect. The alienees, defendants 1 and 2, have preferred this Second Appeal.

Their case was argued elaborately by the learned advocate who appeared for them. He took me through various items of prior debts and submitted that the Subordinate Judge was wrong

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in disallowing as many as five items which, he submitted, should have been allowed in favour of the alienees. After having carefully gone through the facts as found on the evidence discussed by the Lower Appellate Court with reference to these items, I have come to the conclusion that the appellants' contention should be upheld with reference to two such items. The first item relates to a sum of Rs. 62-7-11 dealt with in paragraph 15 at page 5 of the appellate judgment. There was a promissory note executed by the deceased Krishnayya in favour of K. Venkatappayya. That debt was renewed by the widow, and the same was paid off when Ex. IX was executed. The endorsements on the back of the old promissory notes make this point clear, and I think that the Subordinate Judge was not right in disallowing this sum of Rs. 62-7-11. Similarly with reference to a sum of Rs. 70-15-0 discussed in paragraph 21 at page 7, the learned Subordinate Judge did not notice the importance of the endorsements appearing on the back of the prior promissory note executed by the widow's husband. The prior promissory note is Ex. XVI (*c*-1) and that debt was discharged by Ex. XVI (*c*). Ex. XVI (*c*) itself was discharged at the time of Ex. XVI (*a*), and Ex. XVI (*a*) was discharged at the time of the sale to the appellants under Ex. IX. The creditor was the same person, and the endorsement appearing on the back of Ex. XVI (*c*-1) makes it abundantly clear that that debt was paid off when money was borrowed under Ex. XVI (*c*). The learned Subordinate Judge was not right in disallowing this sum of Rs. 70-15-0.

Three other items were discussed before me, *viz.*, those covered by points 4, 5 and 6 discussed in paragraph 21 of the Lower Appellate Court's judgment. The learned Judge in one instance says that the witness who speaks in support of the debt is interested; in another instance, the debt is alleged to have been borrowed in connection with the annual ceremonies of Krishnayya, whereas the date of the debt is very much earlier than the date of the annual ceremony; and as regards the payment of kist, it has not been proved that without raising the debt the kist could not be paid. The learned Judge thought it unsafe to rely upon the oral evidence relating to these debts, and I must uphold his finding on the three particular debts mentioned in paragraph 21, sub-headings 4, 5 and 6. The result, then, is that instead of Rs. 673-3-7 held to be binding by the Subordinate Judge, I have to add a sum of Rs. 133-6-11, thus bringing the amount of binding debt to Rs. 806-10-6. The balance of Rs. 967-13-6 is not proved to be binding. We have therefore

a case where, out of the price of Rs. 1,774-8-0, only Rs. 806-10-6 is proved to be binding and a major portion, Rs. 967-13-6, is not binding. What then is the legal effect to be given to the sale in view of these findings? The deceased left a house site and some cultivable lands. Ex. IX purported to convey 1 acre 75 cents of land. The Lower Appellate Court discussed the question whether there was necessity for this sale, and it observed in paragraph 25 as follows:—

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"But in the circumstances there was no necessity to have sold the whole land. Once she had sold some 60 cents for Rs. 600. Some extent like that could have been sold again for payment of debts. As the major portion of the consideration was held not to be for binding purposes, I am inclined to hold that the sale cannot be upheld and is not binding on the reversioners."

The learned advocate for the appellants drew my attention to the recent Privy Council case, *Krishn Das* v. *Nathu Ram* [1] and another *Niamat Rai* v. *Din Dayal*[2] and a still more recent case *Suraj Bhan Singh* v. *Sah Chain Sukh*[3]; and he argued that the sale should be upheld even though the alienees have not been able to explain what was done with the major portion of the consideration, as already noticed by me. I am not able to understand the Privy Council judgments in the way in which the learned advocate wants me to understand the same. The Privy Council laid down that in cases where a sale is upheld the alienee is no more bound to look to the application of any small amount that might have been fetched by the sale over and above the actual debt which is binding upon the estate. The question whether there was an occasion for the sale, and whether the sale was justified or not, was not the question that their Lordships had to consider; and, as I remarked, the case before them was a case where the sale was binding, but the only question was what was to be done with reference to the small excess amount that remained after the binding debt was discharged. The case before me is a case where the Courts have to find whether there was necessity for the sale or not. Having regard to the finding that there was no occasion to convert this immoveable property into money with reference to a major portion of the transaction, I think the Lower Appellate Court was right in coming to the conclusion that the sale as such of the land of 1 acre 75 cents was not justified. The learned advocate, however, argues that even in that view it does not follow that the alienees are not entitled to get any portion of the property and

1 (1926) L. R. 54 I.A. 79: I.L.R. 49 A 149: 52 M.L.J. 720 (P.C.).
2 (1927) L.R. 54 I.A. 211: I.L.R. 8 L. 597: 52 M.L.J. 729 (P.C.).
3 (1927) 53 M.L.J. 300 (P.C.).

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that all that they are entitled to claim is a charge with reference to that portion of the purchase money which the Court finds to be binding on the estate. He argues that the nature of the land and the other circumstances in the case should be considered by the Court before the Court in such a case could work out the equities between the parties. On the other hand the learned advocate for the respondents drew my attention to a decision of Sadasiva Aiyar and Napier, JJ., in *Rukmani Sundarammal* v. *Muthu Ammal,*[4] where a sale by a minor's guardian of 4 acres of dry land and 4 acres of wet land for a sum of Rs. 1,425 was sought to be impeached by the minor. The Lower Appellate Court found that Rs. 650 out of the price of Rs. 1,425 was binding on the estate and held that the vendees should be allotted a proportionate extent of the land originally intended to be conveyed to them in the ratio of the consideration found by the Courts to be binding. The learned Judges disapproved of that course and held that the plaintiff was entitled in that case to recover the whole of the land alienated, and they gave a decree for a charge on the property in favour of the vendee for the amount found binding. The question how equities have to be worked out in any particular case would depend on the facts and circumstances of each case. In the particular case before me, having regard to the fact that under Ex. IX (*a*), the agreement that preceded the sale—Ex. IX—there is a statement that the sale was to be at the rate of Rs. 1,050 per acre, I think that the question should be further considered as to the exact relief that should be granted in this case. It is also said that 60 cents were sold by the widow for Rs. 600. The question had not to be considered by the trial Court in the view that it took of the case, namely, that the whole of the consideration mentioned in the sale was utilised for binding purposes. It is only when the Lower Appellate Court disallowed the contention of the alienees as regards a portion of the sale price that this question arose for decision. I think that the Lower Appellate Court's discussion of this question in the last few lines of page 25 is not altogether satisfactory in the circumstances. The learned advocates are not now in a position to state what the nature of the evidence is and whether there is any other matter on the record relevant to this point. It, therefore, seems to me that I should call for a finding from the Lower Appellate Court on the question whether, on the finding that only Rs. 806-10-6 is binding upon the estate, the present is a case where the alienees should

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4. (1915) M.W.N. 8.

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or should not be allotted, in the circumstances, a proportionate extent of the lands agreed to be conveyed under Ex. IX (*a*). I am anxious to be placed in possession of all relevant circumstances appearing in the evidence in this case with a view to my finally resolving how to work out the equities of the parties in this particular case. The Lower Appellate Court will accordingly be directed to submit a finding, on the evidence on record, on the question whether the present is a case where the alienees should or should not be awarded any, and if so, what proportion of the lands covered by the sale-deed, having regard to my finding that Rs. 806-10-6 is binding on the estate. Finding in six weeks, and objections in ten days.

In compliance with the order contained in the above judgment, the Subordinate Judge of Guntur submitted the following

FINDING.—I am directed by the High Court to submit my finding on the evidence on record on the question whether the present case is one where the alienees should or should not be awarded any, and if so, what proportion of the lands covered by the sale-deed, Ex. IX, having regard to the finding that Rs. 806-10-6 is binding on the estate.

2. I am directed to state—

(*i*) Whether the defendants 1 and 2 are entitled to a proportion of the property sold by Ex. IX, or only a charge;

(*ii*) If they are entitled to a portion of Ex. IX land, what proportion are they entitled to?

We have, therefore, to consider—

(*i*) Whether a sale was absolutely necessary under the circumstances of the present case.

(*ii*) Whether a sale of a portion of the property could be decreed in this case.

3. The Privy Council decided in *Girdharee Lall* v. *Kantoo Lall*[5] referred to in 52 M.L.J. 724:

"Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for, the fact that a small part is not accounted for will not invalidate the sale."

Explaining this decision, their Lordships of the Privy Council observed in *Krishn Das* v. *Nathu Ram*[1]:

"While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court Judges seem to have thought, that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small . . The learned Judges seem to have lost

1 (1926) L R. 54 I.A. 79 I.L.R. 49 A. 149 · 52 M.L.J. 720 at 724, 725 (P.C.)
5. (1874) L.R. 1 I.A. 321.

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sight of the true question which falls to be answered in such cases, *viz.*, whether the sale itself was one which was justified by legal necessity"

It is, therefore, clear that a sale by a Hindu widow would be upheld—

(*i*) if the vendee paid a fair price for the property;

(*ii*) (*a*) whether a sale was necessary, and whether in the case of the sale in question there was legal necessity;

(*b*) whether the vendee acted *bona fide, i.e.,* honestly and with due caution.

4. My predecessor found in paragraph 25 of his judgment that the price paid for the sale was adequate. The correctness of this finding was not questioned before me. I, therefore, hold that the defendants 1 and 2 paid a fair price for the property under Ex. IX.

5. The learned District Munsif found in paragraphs 19 to 22 of his judgment that the income from the estate in the hands of the 3rd defendant was insufficient for the maintenance of her family, that she had other expenses to meet, and that she was justified in incurring debts. That she was justified in incurring debts to the extent of Rs. 806-10-6 cannot now be disputed. By the date of Ex. IX, the 3rd defendant was in possession of the land sold and a house site (Ex. VI—property). The site, it is said, is worth about Rs. 500. It is true that it was found that Ex. VI sale was unsupported by consideration; but it is not contended that the property was worth more than Rs. 500. We may, therefore, take it that it was worth about Rs. 500. A sale of the site only would not have discharged the whole debt. It is clear that it was advantageous to sell the land and retain the site. The correctness of the observation of my predecessor "there can be no doubt that 1 and 2 defendants' contention that the 3rd defendant had no other means of paying off the debts is proved" was not questioned—so far as her husband's properties were concerned—at the time of the arguments. She is not bound to apply her own properties for the discharge of the debts chargeable on the estate. There was legal necessity for the sale to the extent of Rs. 806-10-6. D.W. 9 wrote Ex. IX-*a*. He deposed that the 2nd plaintiff's brother, N. Venkatasubbayya, settled the terms of the sale and attested the deed. N. Venkatasubbayya attested Ex. IX-*a* also. The witness pays an income-tax of Rs. 138. It is, therefore, clear that nothing was done under the rose. D.W. 13 is a creditor. He attested Exs. IX-*a* and IX. He said that the whole land sold yielded 9 or 10 salakas per year and the makta was 6 salakas. He added referring to

the makta, "which, if adjusted towards the debt, she could not get on for the last 30 years till 1916." The deed was executed by the mother of the plaintiffs, as their guardian. D.W. 13 deposed "The portion left after sale to the defendants was sold to E. Krishnayya (60 cents not included in the suit)." It is clear that 60 cents of the land was sold by her and the plaintiffs did not question that alienation. This shows that the land had to be sold then. The 3rd defendant had to discharge debts to a large extent and everybody knew that a sale of the estate was the only means of wiping off the debts. If they were not discharged they would grow. For all these reasons I hold that a sale in this case was necessary and that the defendants 1 and 2 acted *bona fide* and with caution. There was legal necessity for the sale to the extent of Rs. 806 and odd. It cannot be said that the part of the consideration not accounted for in the present case is small. Even if it is considered small, the circumstances of the case show that a sale was necessary. The proportion can easily be determined because the price per acre is given in Ex. IX-*a* as Rs. 1,050.

6. For all the reasons given *supra*, I find that the defendants 1 and 2 are entitled to a proportion of the property sold. And that proportion is 79,247|507 cents (or roughly 79¼ cents).

This second appeal coming on for final hearing after the return of the finding of the Lower Appellate Court, the Court delivered the following

JUDGMENT.—In this case I called for a finding on two questions (1) whether the defendants 1 and 2 are entitled to a proportion of the property sold under Ex. IX, or only to a charge on the same for the amount found due, and (2) if they are entitled to a portion of the land covered by Ex. IX, what proportion they are entitled to. The learned Subordinate Judge has returned findings to the effect that the defendants 1 and 2 are entitled to a portion of the property sold having regard to the circumstances mentioned by him and that the proportion is 79¼ cents out of 1 acre 75 cents.

The question has been argued before me whether in such cases the proper course is not to declare the sale to be not binding on the reversioner, giving only a charge in favour of the purchaser to the extent of the purchase money found to be binding on the estate. The question as to how the equities should be worked out in any particular case would largely depend on the facts and circumstances existing in that case. No doubt a sort of working rule has been laid down in several decisions of this

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Court to the effect that when consideration to the extent of about, or more than, a moiety of the price is held to be binding on the estate, then the sale, as such, should be upheld, but the purchaser should be directed to pay to the ultimate reversioner the difference between the sale price and the amount found to be binding on the estate. The exact effect of the Privy Council rulings recently given on the direction as to refund of a portion of the price to the reversioner may have to be considered in cases where the question arises. In the present case, however, I have found, that out of the consideration of Rs. 1,774-8-0, a sum of Rs. 806-10-6 only should be taken to be binding on the estate. But the amount that I have held to be binding upon the estate is substantially less than a moiety of the price. That being so, the question arises as to how the equities between the parties should be worked out in the present case. It is in evidence in this case that an extent of 60 cents had been sold by the widow for Rs. 600; and it also appears that under the very agreement which gave rise to the sale in question (Ex. IX-*a*) the price is fixed by the parties at Rs. 1,050 per acre. In these circumstances, I called upon the Lower Appellate Court to submit findings on the two points already mentioned by me, and I have already noted the findings submitted by the learned Subordinate Judge. It was argued by Mr. Somayya, the learned Advocate for the respondent, that in such circumstances the sale should not be upheld in respect of any portion of the property sold; and he contended that the decision in *Rukmani Sundarammal* v. *Muthu Ammal*[4] is clear that the purchaser would be entitled only to a charge on the property in respect of Rs. 806-10-6. On reading the decision referred to by the learned advocate, I find that Sadasiva Aiyar, J., does not discuss this question. I find that Napier, J., refers to this point at page 12 of the report. As I read the judgment of the learned Judge, he does not purport to lay down any general proposition of law applicable to such cases. On the other hand, the learned Judge speaks of equities arising in such cases. The exact nature of the agreement which led to the sale is not clear in that case. I think it is open to the Courts, in case the facts and circumstances warrant, to uphold a sale in part. In the present case, I have got Ex. IX-*a* which evidences the agreement in pursuance of which the property was sold. The agreement is clear that the basis on which the parties contracted was that the property was to be sold at Rs. 1,050 per acre. As I said, we have got also evidence in the

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4. (1915) M.W.N. 8.

case, which the learned Subordinate Judge has referred to, that 60 cents were sold for Rs. 600. The learned Subordinate Judge has come to the conclusion that there is no difficulty as regards apportioning the land which was the subject of sale in the present case. I am, therefore, led to the conclusion that the parties in the present case bargained for the sale and purchase of the land at Rs. 1,050 per acre, and as it was alleged that there was necessity to the extent of Rs. 1,774-8-0, the plot of 1 acre and 75 cents was made the subject of the bargain. Now that I have found that the consideration binding upon the estate is only Rs. 806-10-6, I think, having regard to the facts of the present case, that I am not making a fresh contract between the parties by decreeing that the defendants 1 and 2 should have 79¼ cents out of 1 acre 75 cents covered by Ex. IX. On this question of working out equities, I think that the Full Bench decision in *Baluswami Aiyar* v. *Lakshmana Aiyar*[6] affords me some guidance. There the managing member of a joint Hindu family, for purposes not binding upon the other co-parceners and without their concurrence, agreed to sell a specific item of joint family property. The Full Bench held that the purchaser in such a case could not enforce specific performance of the entire contract, but that in case the purchaser should elect to have the (vendor's) manager's share of the property for the whole of the consideration stipulated, then it would be open to the Court to grant specific performance in respect of the said share only as indicated above. I think that the decision of the Full Bench in *Baluswami Aiyar* v. *Lakshmana Aiyar*[6] lends support to the view that I am inclined to take in this case. Having regard to the facts and circumstances appearing in the present case and having regard to the inference that I draw from the agreement Ex. IX-*a* and the sale-deed Ex. IX, and in the light of the special circumstances found by the Lower Appellate Court, I think that the proper decree that I should pass in the present case is that the ultimate reversioners to the estate of the 3rd defendant would be entitled to recover 1 acre 75 cents covered by Ex. IX less 79¼ cents (to be selected and separated by the Court if the parties interested be not then able to agree) to which I think the vendees should be held entitled in the circumstances. Of course, it goes without saying that the whole of the price paid by them, *viz.*, Rs. 1,774 and odd, should be taken to be the price of 79¼ cents, so that no question of any refund by the ultimate reversioners in favour of defendants 1 and 2

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6. (1921) I.L.R. 44 M 605 41 M.L.J. 129 (F.B).

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or *vice versa* would arise. The decree of the Lower Appellate Court will be modified accordingly.

The Lower Court had directed that each party should bear his own costs in the two Lower Courts. I think I should also pass the same order as regards the costs of this second appeal.

K.C. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Appavu Naicken and others .. *Appellants** (*Defts.*).

In re Appavu Naicken.

Hindu Law—Gift by a widow of properties belonging to her deceased husband—Suit by the donee for ejectment—Whether maintainable

A Hindu widow gave to the plaintiff and another by way of gift some properties of her husband by a registered deed In a suit by the donee for ejectment of the defendants who were not the reversioners from the suit properties,

Held, that the plaintiff who was a mere donee from a Hindu widow possessing a limited interest of a widow in the properties, had such a title after her death as would enable him to maintain a suit for ejectment.

As against all persons other than reversioners the gift or alienation is perfectly valid and the donee or alienee can maintain an action against a person resisting him, provided he is not a reversioner and provided there is no question of limitation.

Bijoy Gopal Mukerji v *Krishna Mahishi Debi,* (1906) L.R. 34 I.A 87: I L.R. 34 C. 329 17 M.L.J. 154 (P.C.), *Kishori Pal* v. *Sheikh Bhusai Bhuiya,* (1909) 14 C.W.N. 106 and *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh,* (1922) I.L.R. 2 Pat. 217, followed.

Srinivasachariar v. *Raghavachariar,* (1924) 46 M.L J. 560, dissented from

Second appeal against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 181 of 1928 (A.S. No. 306 of 1928, District Court, Salem) preferred against the decree of the Court of the District Munsif of Sankaridrug at Salem in Original Suit No. 510 of 1928 (O.S. No. 1031 of 1927, District Munsif's Court, Salem).

G. Lakshmanna and *T. V. Srinivasachari* for appellants.

The Court delivered the following

JUDGMENT.—The defendants are the appellants before me in this second appeal. The suit properties, a house and land, belonged to one Angammal, maternal aunt of the plaintiff. She gave them to the plaintiff and his brother Maria Pillai by a registered deed, dated the 25th of October, 1925, Ex. A. Maria Pillai is dead and the plaintiff is his heir. The plaintiff filed the suit within 12 years after the date of the gift. The defendants pleaded that the gift was fraudulent, whatever that might mean.

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*Second Appeal No. 13 of 1930. 19th February, 1930.

In re Appavu Naicken

They also pleaded that they were reversioners to Angammal. The District Munsif found that neither Angammal nor her donees were in possession of the property within 12 years prior to suit and therefore dismissed the suit. On appeal the Subordinate Judge found that Angammal was in possession until the date of the gift deed and there was therefore no question of adverse possession. He also found that the gift deed was a genuine transaction intended to be given effect to, and given effect to and that the defendants are not reversioners of Angammal. On these findings he decreed the plaintiff's suit. The defendants filed this Second Appeal.

In Second Appeal it has been contended before me that the plaintiff being a mere donee from a Hindu widow possessing the limited interest of a widow in the properties, he has not got such a title after her death as would enable him to maintain a suit for ejectment. It seems to me that the opposite proposition is so well established that I have no hesitation in deciding against the appellant.

In *Modhu Sudan Singh* v. *Rooke*[1] a Hindu widow made a putni lease of two villages. After the widow's death the reversioner accepted rent from the putnidar. The High Court found that, though the putni was void, the acceptance of rent constituted him a tenant from year to year and dismissed the suit. On appeal the Judicial Committee affirmed the High Court's judgment on an even stronger ground. They said:

> "It must be observed that the putni was not void. it was only voidable; the Raja might elect to assent to it and treat it as valid. . . . . The learned Judges of the High Court appear to have fallen into the error of treating the putni as if it absolutely came to an end at the death of the widow . . . Their Lordships think there is a sufficient *prima facie* case of an election by the Raja to affirm the validity of the putni."

They dismissed the appeal. In *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*,[2] the suit was by a reversioner to recover property leased by a Hindu widow for a term of 60 years (which extended beyond her life) from the lessees. The suit was brought within 12 years. The High Court applied Art. 91 and dismissed the suit. On appeal to the Judicial Committee it was held that in such a case the reversioner has not got to set aside the transaction by the Hindu widow and Art. 149 would apply. In describing the nature of a Hindu widow's estate Lord Davey said:

1 (1897) L.R. 24 I.A. 164 I.L.R. 25 C. 1 7 M.L.J. 127 (P.C.).
2. (1907) L.R. 34 I.A. 87: I.L.R. 34 C. 329: 17 M.L.J. 154 (P.C.).

In re Appavu Naicken.

"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir."

Ever since this decision, it has been generally regarded as defining the true nature of a Hindu widow's estate. It is not an estate for life in the sense in which that term is understood in the English law. It is not an estate terminable on the death of the widow. If she makes a gift or alienation otherwise than for necessity, neither the gift nor the alienation is void. It is true that the transaction will be useless against the reversioner, but as against all persons other than reversioners the gift or alienation is perfectly valid, and the donee or alienee can maintain an action against a person resisting him, provided he is not a reversioner and provided there is no question of limitation. It may be that the trouble may turn out to be a thankless task, for after the plaintiff succeeds in his action the reversioner may step in and take away the property from him. But he may not. There is nothing in law to compel the reversioner to take any action and so long as he is silent and has done nothing to treat the gift or alienation as a nullity the title of the donee or alienee continues even beyond the life-time of the widow. This is the ground of the decision of Sir Lawrence Jenkins, C.J., and Caspersz, J., in *Kishori Pal* v. *Sheikh Bhusai Bhuiya*.[3] There it was held that a transferee from a Hindu widow without any legal necessity was entitled to maintain a suit for ejectment. The second appeal was first heard by Brett, J. He said:

"Whether or not it was within the rights of the widow to transfer the entire interest in the property sold, such a sale, under the law, cannot be held to be *ipso facto* void but it is only voidable at the instance of the reversioners. In the present case, there is nothing whatever in the judgments of the Lower Courts to indicate that the reversioners appeared in the suit or that they, in any way, showed that they wished to avoid the transaction. That being the case, I am of opinion that the view taken by the Lower Appellate Court is not correct and that for the purposes of the present suit, the plaintiff has sufficiently established his title."

There was a Letters Patent Appeal in which Sir Lawrence Jenkins, C.J., observed:

"Now, how do the authorities stand? It seems to me that the matter is placed beyond doubt by what was decided and said in *Bijoy Gopal Mukerji*

3. (1909) 14 C.W.N. 106.

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v. *Krishna Mahishi Debi.*[2] It was there pointed out that an alienation by a widow, even though there may not be legal necessity or consent, was not void and could not be regarded as void, because it is the established law that such transfer was capable of affirmation after the death of the widow, and that which is capable of affirmation cannot possibly be void.' If not void, it is clear that the transfer even after the death of the widow had a qualified operation. It is quite true that to nullify such a transfer a suit is not necessary; disaffirmation would be sufficient. But as the transaction is capable of disaffirmation, so it is also capable of affirmation; and, while there is nothing decisive one way or the other, it seems to me that we cannot say that the transfer even after the death of the widow is incapable of operation as against a third party in the position of the defendant-respondent in this appeal. I, therefore, agree with the conclusion at which Mr. Justice Brett has arrived."

In my opinion this case establishes that, where the reversioner is silent, a transferee from a Hindu widow, whether a donee or alienee, has got some qualified title to enable him to maintain a suit for ejectment. If I may humbly say so, I entirely agree with this decision and I think that the proposition is so well established that I regard the attempt to argue this appeal as rather a bold attempt on the part of the learned advocate.

The same conclusion was arrived at in *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh.*[4] In that case there was a gift by a Hindu widow. Two of the reversioners did not dispute the gift after her death in 1880. But the third reversioner did not consent to the gift and sued to recover his one-third share and succeeded after going up to the Privy Council. The donee, Sheo Lochan Singh, sold the other two-thirds share to the plaintiff and he brought a suit to redeem two zarpeshgi mortgages effected by the widow and to which the properties were subject. One of the contentions in the appeal was that the interest of the plaintiff's vendor Sheo Lochan, although valid during the lifetime of the widow, terminated on the death of that lady notwithstanding that the reversioners of the two-thirds share have never from the year 1880, when the widow died, up to the present, elected to treat the transfer as void. After stating this contention, Dawson Miller, C.J., says:

"It is not disputed that a sale or mortgage by a Hindu widow which purports to pass or hypothecate the absolute title is valid against every one except the reversioners and that unless the reversioners elect to treat it as a nullity it subsists as against every one else. In the present case the gift as to the two-third share was never challenged by the reversioners interested in that share. It is argued, however, that a gift stands on a different footing from a sale or mortgage and certain authorities have been relied on in support of this contention. The general rule was clearly laid down by Lord Davey in delivering the judgment of the Judicial Committee in *Bijoy Gopal*

2. (1907) L.R. 34 I.A. 87: I.L.R. 34 C. 329: 17 M.L.J. 154 (P.C.).
4. (1922) I.L.R. 2 Pat. 217.

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Mukerji v *Krishna Mahishi Debi*[2] . . . . The alienation in question in that case was an *ijara* lease but there is nothing in the judgment to suggest that any other form of alienation would not come within the doctrine applied, and it is difficult to see upon what principle a distinction can be drawn between a gift and any other form of transfer "

He then refers to a number of cases and observes:

"None of these cases, however, in my opinion form a guide to the determination of the exact question we are now called upon to decide. It is not a question between presumptive and remote reversioners The question is whether a gift of the whole of her husband's property made by a Hindu widow, not challenged by the reversioners during her life-time and acquiesced in by those who would take a vested interest after her death can be challenged by any one else In my opinion there can be only one answer to this question. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled to remain in the possession of the donee that is their affair and no one else can object If the donee remains in possession under a claim of right for twelve years he will acquire an indefeasible title even against the reversioner"

He then discusses the decision in *Naba Krishna Roy* v. *Hem Lal Roy*,[5] where it was contended that the alienation must be first set aside before the reversioner can sue for possession. Then he observes:

"Such expressions must be regarded in connection with the context and the subject-matter of the suit. It is, in a sense, permissible, though perhaps not strictly accurate, to say that the gift is void when considering its validity as against the reversioner. He may treat it as a nullity and need not sue to have it set aside before claiming possession The true view appears to be that it is not binding upon him and he can elect to treat it as a nullity and sue for possession at any time within twelve years of his interest becoming vested without first suing to have it set aside notwithstanding Art. 91 of the Limitation Act. He may, on the other hand, elect to treat it as valid but no third person can claim his option or set up the plea that such a gift is void merely because it may have been but was not so treated by the reversioner. The judgment of the Calcutta High Court in *Kishori Pal* v. *Sheikh Bhusai Bhuiya*[3] is, I think, an authority for this view. In my opinion the respondent's plea that the gift was void cannot be supported."

If I may humbly say so, I agree with every word of the above opinion of Dawson Miller, C.J. The words "void" and "voidable" have to be carefully used in connection with the rights of the reversioners as against a Hindu widow's alienations. A Hindu widow's gift or alienation without necessity is void as against the reversioner in the sense that he need not set it aside. A mere disaffirmation is enough. But such a transaction is also voidable in the sense that only a reversioner can treat it as a nullity and if he chooses to remain silent nobody else

2 (1907) L.R. 34 I.A. 87. I.L.R. 34 C. 329: 17 M.L.J. 154 (P.C.)
3. (1909) 14 C.W.N. 106 5. (1905) 2 Cal. L.J. 144.

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can question it and it therefore remains valid. The transaction has the character of a transaction which is not void as against the rest of the world. It has the character of a void transaction only as against the reversioner. It is unsafe to apply the word "voidable" to such a transaction in the usual sense of the term. Hence all the confusion that now and then arises, if still such confusion exists after Lord Davey's judgment in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi.*[2] It is true that in *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh*[4] the donee's title to two-thirds became completely indefeasible on account of the acquiescence of the two reversioners for more than 12 years, but the judgment does not rest on that ground. Even if the suit was filed within 12 years, the whole reasoning of Dawson Miller, C.J., applies. Mr. Lakshmanna relied on another decision in *Harihar Ota* v. *Lokenath Misra.*[6] There the plaintiff was the reversioner and it was held that Art. 141 applied to the suit and that he need not sue to set aside the widow's sale. At page 416 Woodroffe, J., observes:

> "As I have pointed out, a Hindu widow stands midway between the cases I have referred to, having neither an absolute nor yet a life-interest in the property, but having a conditional authority only to absolutely dispose of it."

This sentence in my opinion correctly describes the position of a Hindu widow's estate. The further sentences that follow were used by Woodroffe, J., from the point of view of the reversioner. Expressions which suggest that the alienation is good for the lifetime only of the alienor and not valid beyond her death must be understood from the point of view of the reversioner. As Dawson Miller, C.J., observes in *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh,*[4]

> "such expressions must be regarded in connection with the context and the subject-matter of the suit. It is, in a sense, permissible, though perhaps not strictly accurate, to say that the gift is void when considering its validity as against the reversioner."

I do not think the decision in *Harihar Ota* v. *Lokenath Misra*[6] helps the appellant. The case of *Ghanshyam Singh* v. *Teg Bahadur Singh*[7] also, in which the suit was by a presumptive reversioner for a declaration, has no bearing on the present question. The case in *Dashrath* v. *Tarachand*[8] is a case of a donee on the one hand and an alienee for consideration on the other. In that case the defendant was not a person who had no

2. (1907) L.R. 34 I.A. 87: I.L.R. 34 C 329: 17 M.L.J. 154 (P.C.)
4 (1922) I.L.R. 2 Pat 217
6. (1905) 1 Cal. L.J. 408
7 (1911) 9 A.L.J. 496
8. (1927) 10 N.L.J. 216.

In re Appavu Naicken.

title of any kind in the property. It is unnecessary for me either to agree with that decision or dissent from it at present. It is distinguishable and cannot help the appellant in this case.

The learned advocate for the appellant then relied on a group of cases which seem to hold that a will by a widow does not confer such title on a devisee as to maintain a suit for ejectment. The first decision so relied on is a decision of my brother Wallace, J., in *Srinivasachariar* v. *Raghavachariar*.[9] That decision does not apply to the case of a gift or alienation intended to be operative during the widow's lifetime. Either the case of a will stands on a different footing from that of a gift or alienation—then this decision must be distinguished on that ground—or there is no distinction on principle between a will and a gift or alienation—then this decision must be regarded as erroneous. I am inclined to be of the latter opinion. But it is unnecessary for me to say so for this case. It is enough for the decision of this case to say that cases of gifts or alienations are so clear having regard to the decisions I have cited above that they cannot be disturbed by any decision relating to a will. I am unable to see any distinction on principle between the case of a will and that of an alienation, if we start with the position that a Hindu widow's estate is not a life-estate as Lord Davey has said. The decision in *Durga Sundari* v. *Ramkrishna Poddar*[10] does not really support the decision in *Srinivasachariar* v *Raghavachariar*.[9] In that case (*Durga Sundari* v. *Ramkrishna Poddar*[10]) obviously defendants 2 to 5 were the reversioners and the property had been treated as theirs in the prior transactions. A devisee from the widow preferred a claim and it was held by N. Chatterjee, J., that his claim did not prevail. On Letters Patent Appeal Sir Lawrence Jenkins, C.J., and Mookerjee, J., dismissed the appeal. It cannot be said that Sir Lawrence Jenkins, C.J., intended to differ from his former view in *Kishori Pal* v. *Sheikh Bhusai Bhuiya*,[3] whether it is a will or a gift or alienation, as against the reversioners it is a nullity. Some of the defendants in *Durga Sundari* v. *Ramkrishna Poddar*[10] were the reversioners. It is not that a will stands on a lesser footing than a gift or alienation. In *Palchur Mahalakshmamma* v. *Vemi Reddi Babu Reddi*[11] referred to in *Srinivasachariar* v. *Raghavachariar*[9] it was not argued for the appellant that the will by the widow was valid against persons other than the reversioners. If that contention had been expressly

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3. (1909) 14 C.W.N. 106.
9. (1924) 46 M.L.J. 560.
10. (1913) 18 C.L.J 162.
11. (1922) 44 M.L.J. 60.

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raised, I think a different view would have prevailed. The head-note shows that the only point that was argued was that the appeal having been allowed by an earlier order to continue, the objection that it abated cannot be taken at a later stage. If the decision cannot be so distinguished, I am now inclined to dissent from it. The decision in *Raghava Mudaliar* v. *Narayanaswami Mudaliar*[12] is of no value after the decision of the Privy Council, *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2] and must be regarded as overruled by it. Anyhow Wallace, J., himself in *Srinivasachariar* v. *Raghavachariar*[9] recognises that the case of a transaction during the lifetime of the widow intended to take effect *inter vivos* stands on a different footing. The case in *Prafulla Kamini Roy* v. *Bhabani Nath Roy*[13] is a case where the conflict is between a donee from a widow and the reversioner and such a case cannot be affected by the principle of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi.*[2] In my opinion, the matter is so plain that this appeal must be dismissed.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

S. Sendiappa Nadar and others .. *Petitioners** (*Accused*)

v.

The President, District Board, Madura ...*Respondent in all the Petitions* (*Complainant*).

Sendiappa Nadar *v.* The President District Board, Madura.

Madras Local Boards Act (XIV of 1920), Ss 41, 42, 159 and 220—Action in respect of encroachment—Discretion—"Default in performing any duty imposed by the Act"—Exercise of powers under S 42 by President, District Board—Validity

S 159 of the Madras Local Boards Act confers a discretion on the President of the Local Board in the matter of directing the owner of any premises to remove an obstruction If, however, he elects not to take any action it cannot be said he has made "default" in performing his duty within the meaning of S 41; matters of discretion are not considered to be mandatory So the President of the District Board has no power, on the

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*Cr R C. Nos 445, 465 to 468, 520 and 521 of 1930 2nd Dec. 1930
Cr R.P. Nos. 412, 429 to 432, 483 and 484 of 1930

2. (1907) L R. 34 I.A. 87: I.L.R. 34 C 329: 17 M.L J. 154 (P.C)
9. (1924) 46 M.L.J. 560
12 (1893) 4 M.L.J. 88.
13. (1925) I.L.R. 52 C. 1018.

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refusal of the Union Board to take action in that behalf, to invoke the powers under S. 42, to direct the removal of an obstruction on a road not vested in the District Board or serve a notice, or prosecute for failure to comply with it

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Periyakulam, dated 21st June, 1930 and made respectively in C.C. Nos. 509, 511 and 512, 514, 517, 519, 525 and 526 of 1930.

K. V. Sesha Aiyangar and *T. Ramachandra Rao* for petitioners in all the cases.

The Public Prosecutor for the Crown in Cr. R.C. Nos. 445 and 465 to 468 of 1930.

A. Srirangachariar for respondents in all the cases.

The Court made the following

ORDER. *Criminal Revision Case No.* 445 *of* 1930.—The petitioner seeks to revise an order passed in the course of a summons case by the Sub-Magistrate, Periyakulam. There is no provision in the Code of Criminal Procedure for writing orders in the course of a case, and the Sub-Magistrate would have been well advised to have deferred all writing till after the conclusion of the trial. If the petitioner felt aggrieved, his proper course was to have moved in revision against the issue of summons. But speaking for myself, I should not have thought it advisable for this Court to intervene at that stage. Where a remedy ultimately lies by way of appeal, it is unnecessary for the High Court to move in revision. And if it is argued that the Lower Court is clearly acting without jurisdiction, then the short answer is that the party need not concern himself at all about the trial, but can simply appeal if the matter comes to judgment. If, on the other hand, it is not so clear, and it is a moot point whether or not the Lower Court has jurisdiction, then that matter should be thrashed out fully in both Courts below before it is brought, if necessary, to the High Court. Therefore if this petition had come before me for admission I should have dismissed it out of hand. I have only considered it because its admission was allowed, and the petitioner after incurring the cost of printing has brought the matter up ready for hearing.

The President of the District Board, Madura, complains against the petitioner for constructing a building on a road vested in the Board. No section is mentioned. Attached to the

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complaint was a notice sent by the President of the District Board to the petitioner and apparently he is prosecuted for not obeying that notice by removing the encroachment, in which case it would be a complaint under section 220 of the Act (Madras Local Boards Act).

Apparently the road in question is vested in a Union under section 60. The statement in the complaint that the road vested in the District Board seems to have been a deliberate misstatement of fact, because when the petitioner pleaded that the prosecution was without jurisdiction, the President of the District Board disclosed a cause of action of which he must have been aware when he launched the prosecution, but which he chose entirely to conceal. It appears that the Union was requested to move in the matter, and declined. Thereupon the President of the District Board acted under section 42 (*b*) and assumed the function of the Union Board. This may be done under section 41 if the Board has made default in performing any duty imposed upon it by statute.

The President of a Local Board may require the owner of any premises to remove an obstruction under section 159; but the only duty imposed upon him under that section is to exercise his discretion in the matter. The Act does not lay down that he must remove any encroachment; and if, as in this case, he elects not to serve a notice, it cannot be said that he has made default in performing his duty. Matters of discretion are never considered to be mandatory. *Cf.* 10 Halsbury, para. 170.

It must be found, therefore, that the President of the District Board had no authority to serve a notice under section 159 in respect of a road not vested in that Board, or to prosecute for the failure to comply with that notice.

The petition is allowed and the complaint dismissed. A similar order is passed in Criminal Revision Cases Nos. 465, 466, 467, 468, 520 and 521 of 1930.

S.R *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CORNISH.

Kunthi Ammal and another .. *Appellants** (*Defts.*)

v.

Sarangapani Chetti .. *Respondent* (*Plff.*).

Kunthi Ammal v. Sarangapani Chetti.

Indian Arbitration Act (IX of 1899), Ss 2, 3, 4, 8 and 9—Civil Procedure Code, Sch. II, Ss 17, 19, 20—Agreement to refer a dispute to five panchayatdars—Refusal by one of them—City Civil Court appointing a fresh arbitrator—Whether High Court can try the suit—Jurisdiction—Whether provisions of the Civil Procedure Code, Sch. II, can apply—Whether High Court can appoint a fresh panchayatdar in the place of the declining person.

Where an agreement between disputing parties was to refer the matter of contest to a panchayat of five persons in arbitration, and one of them refused to act and the City Civil Court appointed a fresh one in the place of the declining person and where the suit itself could be filed in the High Court at Madras,

Held, (1) that the Indian Arbitration Act governed the submission to arbitration in the case and that section 17, Sch. II of the Civil Procedure Code had no operation and hence the order of the City Civil Court appointing a new person in the place of the arbitrator who refused to act and purporting to be made under that section, was without jurisdiction, and

(2) that even though Ss. 8 and 9 of the Indian Arbitration Act would not apply to the present case, as they would apply only to cases where there was a single or but two arbitrators, still the case would fall under purview of the Act in spite of the fact that the parties were left without any remedy under the Act

This disability is certainly "a blot" in the Act, but it must remain so till it is cured by the Legislature

Gopalji Kuverji v. *Morarji Jeram,* (1919) I.L.R. 43 Bom. 809 and In re *Smith & Service and Nelson & Sons,* (1890) 25 Q.B.D. 545, relied on.

Manchester Ship Canal Co v *S Pearson & Son, Ltd,* (1900) 2 Q B 606; In re *Babaldas Khemchand,* (1919) I.L.R. 45 Bom 1 and *General Electric Trading Co* v. *Siemens (India), Ltd.,* (1928) I.L.R 56 C 848, referred to.

Appeal against the order of the City Civil Court, Madras, dated 14th November, 1927, in Original Suit No. 580 of 1926 and petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act to revise the order of the City Civil Court, Madras, dated 14th November, 1927, in Original Suit No. 580 of 1926.

K. V. Sesha Aiyangar for appellants.

P. V. Venugopala Aiyar for respondent.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS. *Madhavan Nair, J.*—This Civil Miscellaneous Appeal arises out of an order passed by the City Civil Judge in a suit to have an agreement submitting a case for arbitration

*A.A.O. No. 139 of 1928 and C.R.P. No. 1048 of 1928. 22nd April, 1930.

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filed in Court and to provide for the arbitration in accordance with law. The agreement sought to be enforced was entered into between the plaintiff and the defendants referring disputes about their joint family property to five panchayatdars; asking them to divide it among the signatories to the document. One of the panchayatdars refused to act as an arbitrator. For this and other reasons the defendants contended that the agreement could not be enforced. They also contended that the City Civil Court had no jurisdiction to entertain the suit as it fell within the scope of the Indian Arbitration Act (IX of 1899) which vests the High Court with exclusive jurisdiction to try suits of this nature. The learned City Civil Judge overruled these contentions and passed the following order:

"I, therefore, direct that Bhagirathi Pillai be appointed arbitrator in place of the person who has resigned and remit this case to the original arbitrators who have not resigned and this additional person newly appointed to dispose of the case according to law and submit a finding within one month."

This appeal has been filed by the defendants against this order.

It is urged on behalf of the appellants that the Indian Arbitration Act gives exclusive jurisdiction to the Original Side of the High Court to determine this matter, as, if it were the subject-matter of a suit, the suit could be instituted only in a Presidency Town, and that the Code of Civil Procedure, Second Schedule, provides that the Second Schedule of that Code shall not apply to any case falling within the purview of the Indian Arbitration Act. On behalf of the respondents it is contended that the Indian Arbitration Act will not apply to submissions or arbitrations where there are five arbitrators as in the present case, that is, more arbitrators than one contemplated by sections 8 and 9 of the Act and that, even if the Act applies, the City Civil Court has jurisdiction as it is directed under the Madras City Civil Court Act (VII of 1892) to take cognizance of all suits triable on the Original Side of the High Court, provided the value of the suit does not exceed Rs. 2,500, and provided further that the suit does not relate to Probate, Matrimonial and Insolvency Proceedings. It is admitted that the present case falls within these provisions of the Madras City Civil Court Act.

On the above arguments, two questions arise for consideration: (1) Whether the jurisdiction to determine the subject-matter submitted to arbitration in the present case lies exclusively with the High Court; (2) if so, is the City Civil Court vested with that jurisdiction under the Madras City Civil Court

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Act? As we shall presently show, in the view that we take of this case, it is not necessary to express any definite opinion on the second question.

Under the Indian Law, reference to arbitration is governed by the provisions of the Code of Civil Procedure and the Indian Arbitration Act (IX of 1899). Under section 89, cl. (1) of the Civil Procedure Code,

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule"

Section 3 of Act IX of 1899 says that sections 523 to 526 of the Code of Civil Procedure, 1882, (paras. 17, 19 and 20 of Sch. II of the Code of Civil Procedure, 1908) shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply. This section excludes those references to arbitration to which the provisions of the Act apply from the operation of paras. 17 to 20 of the Second Schedule of the Civil Procedure Code. Section 2 of the Act states—

"This Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town."

According to this section the Act would apply to an agreement forming the subject-matter of a reference to arbitration only if a suit between the parties with respect to that subject-matter could be instituted in a Presidency Town. Section 4 of the Act states that "the Court" referred to in the Act in the Presidency Towns is the High Court. In the present case it is clear that if a suit is instituted by the parties with reference to the subject of arbitration, that is, the division of their family property, that suit will have to be instituted at Madras, and therefore, under sections 2 and 4 of the Act, the High Court will be the Court having jurisdiction to determine the reference to arbitration. This is the argument of the appellant. The respondents meet this argument by saying that the plaintiff in order to succeed in his contention should, besides showing that his case falls within section 2 of the Act, also show that the provisions of the Act would apply to the submission or arbitration in question. This argument has special reference to section 3 of the Act and is put in this way: Having regard to that section, only those submissions, *i.e.*, written agreements to submit, present or future differences to arbitration, whether an arbitrator is named therein or not, [*see* S. 4 (*b*)], to which the provisions of the Indian Arbitration Act will apply, will be exempt from the operation of the Code of Civil Procedure; in

other words, if any of the provisions embodied in any section of the Arbitration Act will not apply to a "submission," then that "submission" will be governed by the rules of the Code of Civil Procedure. In this case, as one of the panchayatdars has refused to act, it is conceded that without resorting to section 8 or 9—if these sections will apply—his vacancy cannot be filled up and that relief cannot be given to the plaintiff. The respondent proceeds to show that sections 8 and 9 of the Indian Arbitration Act will not apply to a submission like the present one wherein the dispute is referred to the arbitration of five panchayatdars as those sections will apply only to cases where there is "a single arbitrator or but two arbitrators". In support of his interpretation of sections 8 and 9 of the Act, *Gopalji Kuverji* v. *Morarji Jerani*[1] is relied on. If this argument is accepted, it will follow that the question of the application of the Act should be considered with reference to both sections 2 and 3, and that if any of the sections of the Act will not apply in the matter of any submission, then despite the fact that a suit in respect of its subject-matter if instituted will undoubtedly lie in the High Court, the provisions of the Code of Civil Procedure will become applicable and the City Civil Court will have exclusive jurisdiction to deal with the matter.

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We will now proceed to see how far this argument of the respondent can be accepted. Section 8 of the Indian Arbitration Act deals with the power of the Court in certain cases to appoint an arbitrator, umpire or a third arbitrator. Section 9 of the Act deals with the power which the parties have in certain cases to supply the vacancy. I do not think it is necessary for deciding this case to deal at length with the scope of the provisions of these two sections, as I am prepared to accept the reasoning of the learned Judges in *Gopalji Kuverji* v. *Morarji Jerani*,[1] in which the question is discussed elaborately. In that case, strongly relied on by the respondent, it was held by Scott, C.J., and Hayward, J., reversing the judgment of Marten, J. that, in a case of submission to three named arbitrators all of them after acting having declined to proceed any further, the Court had no jurisdiction to appoint fresh arbitrators in their place under the Indian Arbitration Act. Generally stated, following the decisions In re *Smith & Service and Nelson & Sons*[2] and *Manchester Ship Canal Company* v. *S. Pearson & Son, Ltd.*[3], under the English Arbitration Act, the learned Judges adopted

1. (1919) I L R 43 B 809 2 (1890) 25 Q B D 545.
3 (1900) 2 Q.B. 606.

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the view that sections 8 and 9 would apply only to cases where there is a single arbitrator or but two arbitrators. According to this decision, these sections will not apply to the present case as the agreement in question refers the matter in dispute to five panchayatdars, and therefore, if the respondent's argument is correct, it would follow that the provisions of the Code of Civil Procedure are not excluded under section 3 of the Act and the City Civil Court must be held to have exclusive jurisdiction to deal with the matter. The appellants argue that this decision is wrong and rely on *General Electric Trading Co.* v. *Siemens (India), Ltd.*[4] Sections 8 and 9 of the Indian Act correspond to sections 4 and 5 of the English Arbitration Act which correspond to clauses 12 and 13 of the Common Law Procedure Act of 1854. So far as I can see, though there is some variation in the wording of sections 5 and 6 of the English Arbitration Act from the wording of the corresponding section of the Common Law Procedure Act, the purport of the sections remains exactly the same. In my view there is no support for the view of Ghose, J, that the wording of sections 5 and 6 of the English Arbitration Act would make them applicable to cases of three arbitrators, cases to which admittedly sections 12 and 13 of the Common Law Procedure Act would not apply. In this connection, it may be observed that *In re Smith & Service and Nelson & Sons,*[2] relied on by the learned Judges of the Bombay High Court. was decided after the passing of the English Act of 1899, and under it it was held that—

"where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the Court has no power under or apart from the Arbitration Act, 1889, to order him to do "

In that case, Lindley, L.J., made the following observations:—

"It certainly looks like a blot in the Act, that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, sections 4, 5 and 6 do not apply; but we cannot help that."

This so-called blot in the English Act was cured in England by the enactment of the Administration of Justice Act of 1925, 10 and 11 Geo. V, c. 81. This would show that the Legislature thought that the interpretation of sections 5 and 6 of the English Act adopted by the learned Judges in *In re Smith & Service and Nelson & Sons*[2] was correct. The blot in the Indian enactment has not been cured by the Indian Legislature as was done

1 (1919) I.L R. 43 B 809. 2. (1890) 25 Q B.D 545
4. (1928) I.L.R. 56 C. 848.

by the English Legislature with reference to the English Act. Having regard to these considerations it seems to me that the interpretation of the learned Judges in *Gopalji Kuverji* v. *Morarji Jeram*[1] of sections 8 and 9 of the Indian Arbitration Act is amply supported by the English authorities. The subsequent decision of the Bombay High Court, In re *Babaldas Khemchand*,[5] in no way conflicts with the prior decision in *Gopalji Kuverji* v. *Morarji Jeram*.[1] *Mackintosh & Co.* v. *Scindia Steam Navigation Co., Ltd.*[6] shows that—

"where the parties agree to refer their disputes to arbitration without the intervention of the Court, no suit having been brought in respect of those disputes, the Court has no power to order the issue of a commission for the examination of witnesses in the arbitration."

Though I agree thus far with the respondent's contention that the provisions of sections 8 and 9 of the Indian Arbitration Act do not apply to a case of five panchayatdars like the present one, it does not *necessarily* follow from this conclusion that the Indian Arbitration Act will not apply to the present case. The very case so strongly relied on by the respondent, *Gopalji Kuverji* v. *Morarji Jeram*[1] supports this position. As observed by Scott, C.J. (*see* page 831), "the Act does not attempt to provide for every case," and Mr. Justice Hayward points out that, though reference to three named arbitrators is not included within the particular provisions of sections 8 to 9, they might fall within the provisions of the other sections including section 19 of the Indian Arbitration Act. In this connection attention may also be drawn to the observations of Vaughan Williams, L.J., in *Manchester Ship Canal Company* v. *S. Pearson & Son, Ltd.*,[3] which show that the English Arbitration Act would govern a submission to arbitration even though the reference is to three arbitrators. The conclusion is therefore clear that though sections 8 and 9 of the Indian Arbitration Act will not apply to the present case, still the case will fall under the purview of the Act though the parties are left without any remedy under the Act. This blot in the Act will not, in my opinion, make the Act inapplicable to a case though reference is made in it to five panchayatdars. Two inferences follow from this conclusion: (1) that section 3 cannot be used in the manner suggested by the appellant to limit the scope of section 2, that section 3 simply means that in cases governed by the Indian Arbitration Act, the operation of the provisions of the Code of Civil Procedure mentioned in it is excluded, that the reference to arbitra-

1. (1919) I.L.R. 43 B 809
3. (1900) 2 Q B 606.
5. (1919) I.L.R. 45 B. 1.
6 (1922) I.L.R. 47 B 250.

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tion in the present case is not governed by the provisions of the Code of Civil Procedure and is not therefore within the exclusive jurisdiction of the City Civil Court, and (2) that section 2 read with section 4 vests the jurisdiction to deal with the present reference exclusively in the High Court, but that the High Court, in the light of the foregoing observations, must be held to be unable to give the relief asked for by the plaintiff under section 8 or 9 of the Act as according to our interpretation these sections cannot be applied to cases wherein the reference is made to five panchayatdars. This disability is certainly "a blot in the Act"; but it must remain so till it is cured by the Legislature.

It is conceded that, if the High Court cannot interfere in the present case, then the City Civil Court which, according to the respondent, is directed to deal with the matter, is also helpless, and therefore the second question raised in this appeal as regards the jurisdiction of the City Civil Court under the Code of Civil Procedure need not be decided.

Having regard to my view that the relief asked for cannot be given to the plaintiff under section 8 or 9 of the Act, we must set aside the order of the Lower Court. In the result, the plaintiff's suit will be dismissed. In the circumstances, we make no order as to costs.

No special order is necessary in the Civil Revision Petition.

Cornish, J

Cornish, J.—I agree. In my opinion the Arbitration Act governs the submission to arbitration in the case before us. If that be so, section 17 of the Second Schedule of the Civil Procedure Code has no operation; and it follows that the order of the City Civil Court Judge purporting to be made under that section was without jurisdiction and should be set aside. Section 2 of the Arbitration Act states that subject to the provisions of section 23 (which are not material here) the Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could be instituted in the Presidency Town. Admittedly, a suit in respect of the subject-matter of the submission in this case could have been instituted in the Presidency Town. Then section 3 of the Arbitration Act provides that sections 523 to 526 of the Code of Civil Procedure, 1882, corresponding to paragraphs 17, 19, 20 and 21 of Sch. II of the Civil Procedure Code, 1908—

"shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply"

The meaning of this is, clearly, that when the Arbitration Act governs a submission, the operation of the

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specified sections of the Civil Procedure Code is excluded. This exclusion is recognised by section 89 of the Code of Civil Procedure, which says:

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions in the Second Schedule";

and this must mean that the provisions of the Second Schedule shall apply to an arbitration except when the Arbitration Act says that they shall not. But the contention is that the Arbitration Act has no application when, as in the case before us, the submission is to more arbitrators than are contemplated by sections 8 and 9 of the Act. It is established by In re *Smith & Service and Nelson & Sons*,[2] *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*[3] and *Gopalji Kuverji* v. *Morarji Jeram*[1] that the power given to the Court by sections 5 and 6 of the English Act, and by the identical sections 8 and 9 of the Indian Act, is confined to cases where there is a single arbitrator or but two arbitrators; *see* the judgment of A. L. Smith, L J., in *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*[3] But these authorities do not, nor do the later authorities In re *Baboldas Khemchand*[5] and *Mackintosh & Co.* v. *Scindia Steam Navigation Co., Ltd.*[6], in my opinion, support the argument that a submission ceases to be governed by the Arbitration Act by reason of the submission being to three or more arbitrators. On the contrary that proposition appears to be negatived by the judgment of Vaughan Williams, L.J., in *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*,[3] where he said:

"In the report of In re *Smith and Service*[2] the judgments, in which it is said that sections 4, 5 and 6 [these sections corresponding to sections 19, 8 and 9 of the Indian Act] did not apply, must be read by the light of the argument for the appellants It is there said that section 4 had no application to that case, because no legal proceedings had been taken It is plain from this that when the learned Lords Justices said that section 4 did not apply, it was not meant that this was because it was a case of reference to three arbitrators, but only because no legal proceedings had been commenced."

In short, it was pointed out that the Arbitration Act was not rendered inapplicable to a submission because in a particular instance the powers given to the Court by the Act were unavailing.

On the question which was raised by Mr. Sesha Aiyangar, whether the definition of "Court" in section 4 of the Arbitration

1 (1919) I.L.R. 43 B 809.
2 (1890) 25 Q.B.D. 545.
3 (1900) 2 Q.B. 606 at 608
5. (1919) I.L.R. 45 B. 1.
6. (1922) I.L.R. 47 B. 250.

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Act is to be taken as indicating another exception to the jurisdiction conferred on the City Civil Court by section 3 of the Madras City Civil Court Act (VII of 1892), I do not think it is necessary to give a decision, for it is obvious that if the High Court has no power under section 8 or 9 of the Arbitration Act to make an appointment of an arbitrator when the reference is to five arbitrators, the City Civil Court has no such power.

For these reasons, I agree that the appeal should succeed and be allowed.

K.C. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD TOMLIN, LORD MACMILLAN, SIR JOHN WALLIS, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Obla Sundarachariar and others .. *Appellants**

v.

Narayana Aiyar and others .. *Respondents.*

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Registration Act (XVI of 1908), S 17—Transfer of Property Act (IV of 1882), S 59—Mortgage by deposit of title-deeds—Memorandum containing list of title-deeds deposited—Necessity of registration—Test

At the time of creating an equitable mortgage by deposit of title-deeds in Madras, the mortgagor handed to the creditor a memorandum which consisted of a list of the title-deeds with the introductory words, "As agreed upon in person I have delivered to you the under-mentioned documents as security" The memorandum was not registered and the question was if it fell within S. 17 of the Registration Act and if the mortgage was capable of legal proof.

Held, the transaction did not require a registered instrument under the last clause of S. 59 of the Transfer of Property Act, and the memorandum was only a list of documents deposited as security in pursuance of the agreement reached in person It did not embody the terms of the agreement between the parties It did not "purport or operate to create or declare any right or interest in property" and did not require to be registered

Subramonian v. *Lutchman,* (1922) L.R. 50 I.A. 77: I.L.R. 50 Cal. 338: 44 M.L.J. 602 (P.C.), distinguished.

Kedarnath Dutt v *Shamloll Khettry,* (1873) 11 Beng L.R. (O.C.J) 405, referred to.

Though an agreement embodied in a written document requiring registration and not so registered cannot be proved by the written document or by oral evidence, yet where there is no written agreement the intention to create a security by deposit of title-deeds may be evidenced by written as well as by oral evidence

In order that a memorandum may be governed by S 17 of the Registration Act, it is not necessary that it should embody all the particulars of the transactions of which the deposit forms part, but no memorandum can be within the section unless on its face it embodies such terms and is

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*P.C. Appeal No. 59 of 1930 13th January, 1931.

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signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit was concerned it was intended to constitute the agreement between the parties.

Judgment of the High Court, Madras, affirmed.

Appeal No. 59 of 1930, by special leave, from a judgment and decree, dated the 26th October, 1928, of the High Court, Madras, which affirmed a judgment and decree, dated the 3rd November, 1923, of the Subordinate Judge of Dindigul.

The suit out of which this appeal arose was instituted in the Court of the Subordinate Judge of Madura by one E. N. A. Samu Pattar, deceased, now represented by the respondents, to recover Rs. 60,895-14-0 due on a promissory note executed by one Krishnaswami Aiyar on behalf of his joint family firm to the plaintiff and for a mortgage decree against the family properties on the ground that there was an equitable mortgage by way of deposit of title-deeds of the properties effected in the City of Madras; the defendants (appellants) contended that there was no valid equitable mortgage, as Exhibit B, the memorandum evidencing the transaction, was not registered and was inadmissible in evidence to prove a valid mortgage. The trial Court held that Exhibit B did not require registration and passed the usual mortgage decree in favour of the plaintiff. The learned Judge referred to the rule laid down by the Privy Council in *Subramonian* v. *Lutchman*[1] and concluded his judgment in the following words:—

"We see that only one fact has been recorded and nothing more. That one fact was that five documents of which a list was appended were handed over to the plaintiff as security. It does not refer to any loan. It states that the handing over was in accordance with the agreement arrived at previously in a personal interview.

"What that agreement was has not been specified. It, therefore, has reference to an already completed transaction. Parties came together to negotiate a loan. The loan was to be by way of mortgage by deposit of title-deeds. Title-deeds were examined and accepted and the terms of the loan were settled. All this was done orally. Thereafter, the promissory note was executed and the memorandum evidencing the deposit of title-deeds. There are no words in the memorandum to connect the deposit with the loan evidenced by the promissory note. None of the terms of the contract between the parties was embodied There is no promise to pay any money and there is no reference to a loan at all .The bargain between the parties was referred to but not incorporated in it. In these circumstances I am of opinion that Exhibit B does not require registration"

The High Court, on appeal, affirmed the view of the Subordinate Judge. In the course of their judgment, the learned Judges (Madhavan Nair and Jackson, JJ.), made the following observations:—

"Applying the test laid down by the Privy Council in *Subramonian* v. *Lutchman*[1] we have to see whether Exhibit B contains the bargain between the parties; if it does, it is inadmissible in evidence for want of registration. . . . In our opinion Exhibit B is

1. (1922) L.R. 50 I.A. 77: I.L.R. 50 C. 338: 44 M.L.J. 602 (P.C)

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only a record of the delivery of the documents and nothing more. . . . Exhibit B does not contain the terms of the contract between the parties. In these circumstances we do not think that it requires registration. The cases quoted above (*Chegamull Suganmull Sowcar* v. *Govindasami Chetti*,[2] *Nageswara Aiyar* v. *Srinivasa Aiyangar*[3] and *Sundaramma* v *Seetaramayya*[4]) and which were referred to by the learned advocate for the appellants are all distinguishable as in some of those cases the main terms of the contract between the parties appeared in the memorandum, whilst in others the equitable mortgage itself was created by it . Applying the principle of the decision in *Subramonian* v *Lutchman*[1] we hold that Exhibit B does not require registration and does not exclude other evidence regarding the creation of an equitable mortgage by deposit of title-deeds. The equitable mortgage alleged has been completely proved in this case and we see no reason why effect should not be given to it"

The principal question on the present appeal to His Majesty in Council was whether the memorandum in question, Exhibit B (the terms of which are set out in their Lordships' judgment) constituted the bargain between the parties and therefore required registration.

Upjohn, K. C. and *Narasimham* for appellants.—We submit that the memorandum constituted the bargain between the parties within the meaning of the rule laid down by Lord Carson in *Subramonian* v. *Lutchman.*[1] Refers to Ghose on Mortgage, 4th edition, page 158. The words "as security" in Exhibit B are very significant. We rely on the three Madras decisions cited in the High Court judgment, *Chegamull Suganmull Sowcar* v. *Govindasami Chetti*,[2] *Nageswara Aiyar* v. *Srinivasa Aiyangar*[3] and *Sundaramma* v. *Seetaramayya.*[4]

[LORD TOMLIN refers to the judgment of Ramesam, J., in *Sundaramma* v. *Seetaramayya*[4].]

The bargain was not already completed when Exhibit B was executed. Refers to the evidence.

[Their Lordships remarked that the real question was, whether Exhibit B created or declared an interest in immoveable property within the meaning of section 17, Registration Act.]

[LORD TOMLIN.—The document does not, on the face of it, necessarily create a charge.]

[LORD MACMILLAN.--The first word of the statute (section 17, Registration Act) is that the document must be an *instrument,* and that means an effective document, *i e*, a document creating some legal right or liability.]

[SIR JOHN WALLIS.—There might have been a complete oral contract, and later on Exhibit B executed. If you had a complete

1. (1922) L R. 50 I A. 77 I.L.R. 50 C 338: 44 M.L.J. 602 (P C)
2. (1928) 112 I.C. 491
3. (1925) 23 L.W. 675.
4. (1927) 112 I.C. 278.

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oral contract, Exhibit B would be merely in part performance of the contract, as in a Presidency Town you can have a mortgage by deposit of title-deeds: section 59, Transfer of Property Act, last clause.]

[SIR GEORGE LOWNDES observed that in *Subramonian* v. *Lutchman*[1] Lord Carson apparently used the word "bargain" in the sense of a "contract" between the parties within the meaning of section 91, Evidence Act.]

Dunne, K.C. and *Dubé* for respondents.—Exhibit B being merely evidence of an equitable mortgage, the Board's judgment in *Subramonian* v. *Lutchman*[1] is distinguishable. Section 91 of the Evidence Act was there applied and shut out oral evidence.

[LORD TOMLIN observed that section 91 is merely a statutory embodiment of the rule in *Shaw* v. *Foster*.[5]]

Upjohn, K.C., replied.

It is a material circumstance in this case that the mortgagee got the exhibit before he paid the money. Refers to Macpherson, J.'s judgment in *Kedarnath Dutt* v. *Shamloll Khettry*[6] and quotes from Couch, C.J.'s judgment on appeal in the same case. The facts of the present case are similar to those before Phear, J., in *Dwarkanath Mitter* v. *Sarat Kumari Dasi*.[7] The memorandum, Exhibit B, when coupled with the pro-note, is the only repository of the agreement between the parties within the rules laid down by Lord Cairns in *Shaw* v. *Foster*[5] and by Couch, C.J., in *Kedarnath Dutt* v. *Shamloll Khettry*.[6]

13th January, 1931. Their Lordships' judgment was delivered by

LORD TOMLIN.—The suit out of which this appeal arises was instituted in 1921 in the Court of the Subordinate Judge at Madura by one Samu Pattar, a money-lender doing business in Palghat, Madras, and other places. He claimed in effect to enforce an equitable mortgage by deposit of title-deeds to secure Rs. 60,000 and interest and to recover a personal judgment for the amount of the mortgage debt so far as the security should prove insufficient. Lord Tomlin

The defendants to the suit were the members of a joint family firm trading at Madura. The present appellants, who are assignees of the interest of the joint family firm in the property comprised in the title-deeds in question, were brought into the suit as additional defendants.

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1 (1922) L.R. 50 I.A. 77: I.L.R. 50 C. 338: 44 M.L.J. 602 (P.C.)
5 (1872) L.R. 5 H.L. 321. 6 (1873) 11 Ben. L.R. (O.C.J.) 405.
7. (1871) 7 Ben. L.R. (O.C.) 55.

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On the 3rd November, 1923, the Subordinate Judge made the usual mortgage decree for the amount claimed and costs with a direction for sale in default of payment and with liberty for the plaintiff if the proceeds of sale of the property proved insufficient to apply for a supplemental decree against the family properties of the members of the joint family firm and also against the members of the joint family firm personally.

The present appellants appealed to the High Court.

On the 26th October, 1928, the High Court dismissed the appeal with costs.

The appellants obtained special leave to appeal to His Majesty in Council. The respondents to the appeal are the legal representatives of the plaintiff who is dead.

The question raised by the appeal is whether there is any mortgage capable of legal proof having regard to the fact that there was a written memorandum relating to the matter which was not registered under the Registration Act (XVI of 1908).

The facts are to be gathered from the documents and the evidence of witnesses called by the plaintiff. No evidence was adduced by the defendants.

The story is in substance as follows:—

The joint family firm owed the plaintiff Rs. 36,809-0-10 and wanted a further advance so as to make up a total debt of Rs. 60,000. Their manager, Krishnaswami Aiyar, entered into negotiations with the plaintiff through the plaintiff's son and eventually came to Madras to deal with the matter. Security was demanded. The deeds of two properties were offered but rejected as inadequate. Then the deeds of three additional properties were offered. The five properties were considered adequate security. The transaction was completed on the 14th March, 1921, between 4 P.M. and 6 P.M., in the house of the plaintiff's son. There were present the plaintiff, his son, the manager of the joint family firm, and one Doraisami.

Before the plaintiff arrived on the scene the manager had already handed the deeds to the plaintiff's son with two documents which he had written out and signed, namely: (1) A promissory note for Rs. 60,000 payable on demand with interest at 1 per cent. per mensem, and (2) a memorandum which consisted of a list of the title-deeds, with the following introductory words:—

"Written to E. N. A. Samoo Battar by Krishnaswami Aiyar, of S. V. Ramasami Aiyar and Brothers,

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"As agreed upon in person I have delivered to you the undermentioned documents as security."

Both documents were dated the 14th March, 1921.

The promissory note was signed by the manager but was not witnessed. It showed on its face that the Rs. 60,000 was made up of Rs. 36,809-0-10 amount already due and Rs. 23,190-15-2 "amount received in cash to-day".

The memorandum was signed by the manager and witnessed by Doraisami.

Upon the arrival of the plaintiff his son showed him the deeds and the promissory note and the memorandum and was instructed by the plaintiff to examine the deeds to see whether they were in order.

When this examination had been completed and the deeds were found to be in order, the deeds, the promissory note, and the memorandum were put away by the plaintiff's son in a safe and a cheque for Rs. 23,115 together with cash to make up Rs. 23,190-15-2 was handed to the manager.

Under section 17 of the Registration Act, registration is required of (*a*) instruments of gift of immoveable property, and (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards in immoveable property.

By section 49 of the same Act it is provided that no documents required by section 17 to be registered shall (*a*) affect any immoveable property comprised therein; (*b*) confer any power to adopt; or (*c*) be received as evidence of any transaction affecting such property or conferring such power; unless it has been registered.

It is necessary also to bear in mind section 59 of the Transfer of Property Act which provides that where the principal money secured is Rs. 100 or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses, but that nothing in the section now being cited shall be deemed to render invalid mortgages made in the towns of Calcutta and Madras, and certain other towns therein mentioned by delivery to a creditor or his agent of documents of title to immoveable property with intent to create a security therein.

Now this transaction took place in Madras and did not therefore require a registered instrument under section 59 of the Transfer of Property Act.

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The question which falls to be determined is whether the memorandum having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff is an instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest whether vested or contingent of the value of Rs. 100 and upwards to or in immoveable property.

If the memorandum is considered *in vacuo* its meaning is plain. It records particulars of documents which it states have been delivered as security in pursuance of an agreement reached in person.

It does not state what were the terms of the agreement or indicate the nature of the matter for which the deeds were deposited as security. So far as anything disclosed by the memorandum is concerned the security may have been for money lent or to be lent or for the performance of some obligation, the breach of which would sound in damages.

Considered in this light the memorandum, in their Lordships' judgment, merely records particulars of deeds the subject of a deposit. Is there then anything in the circumstances connected with the creation of the memorandum or in the way in which the parties dealt with it which permits or requires some other meaning or effect to be given to it?

The answer, in their Lordships' judgment, must be in the negative. Even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document. It was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties. Upon this view of the matter apart from authority it would in their Lordships' opinion be impossible to hold that the document purported or operated to create or declare any right, title or interest in the property and required to be registered under section 17 of the Registration Act.

In this connection it may be observed that though an agreement embodied in a written document requiring registration under section 17 of the Registration Act and not so registered cannot be proved by the written document (*see* section 49 of the Registration Act) or by oral evidence (see *Shaw* v. *Foster*[5]),

5. (1872) L.R. 5 H.L. 321.

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yet where there is no written agreement there seems no reason why the intent to create a security by deposit of title-deeds under the exception provided for in section 59 of the Transfer of Property Act should not be evidenced by written as well as by oral evidence.

It is, however, urged by the appellants that the present case is covered by the decision of their Lordships' Board in *Subramonian* v. *Lutchman*[1] and that the appeal should succeed.

The memorandum in that case was held to embody the agreement between the parties and is in their Lordships' view different in that respect from the memorandum here under consideration.

Lord Carson, in delivering the judgment of the Board, quoted with approval a passage from the judgment of Couch, C.J., in *Kedarnath Dutt* v. *Shamloll Khettry*.[6] That passage is in the following terms:—

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act"

Ultimately Lord Carson summed up the conclusion of the Board in these words:

"Their Lordships have no doubt, therefore, that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim and as it was unregistered it ought to have been rejected."

While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title-deeds can be within section 17 of the Registration Act unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties.

Having regard to the view already expressed of the effect of the memorandum now under consideration, no comfort is to be found for the appellants in the case upon which they relied.

1. (1922) L.R. 50 I.A. 77 I.L.R. 50 C. 338: 44 M.L.J. 602 (P.C.)
6. (1873) 11 Ben L.R. (O.C.J.) 405.

P. C.

Sundara-charlar v. Narayana Aiyar.

Lord Tomlin.

Their Lordships reach the conclusion that the memorandum was not other than a written record of the particulars of deeds the subject of an agreement constituted in fact by the act of deposit and the payment of the money, and that it neither purported nor operated to create or declare any right, title or interest in the property included in the deeds, with the result that it did not require registration.

In their Lordships' opinion the appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant and Dold.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

B. Sivaram Dubai .. *Appellant** (*Petitioner*)

v.

R. Rajagopala Misra and another .. *Respondents* (*Petitioners*).

Sivaram Dubai v. Rajagopala Misra.

Civil Procedure Code (*V of* 1908), *S* 92—*Scheme decree—Clause giving power to District Court to fill in vacancies arising among trustees*—Ultra vires—*Whether an appeal lies under S* 47, *Civil Procedure Code*

A provision in a scheme decree that, when vacancies occur among the trustees other than the life-trustee, the vacancies shall be filled by the District Court is not in any way in conflict with the interpretation of S 92 of the Code of Civil Procedure by the Full Bench decision in *Veeraraghavachariar* v *Advocate-General of Madras,* (1927) I.L.R. 51 M. 31: 53 M.L J 793 (F.B).

No appeal lies in this case under section 47 of the Civil Procedure Code.

Ponnambala Tambiran v. *Sivagnana Desika Gnana Sambhanda Pandara Sannadhi,* (1894) L.R. 21 I.A. 71. I L.R. 17 Mad 343 (P C), distinguished

Ramanathan Chetti v *Balayee Ammal,* (1927) 27 L W 32, explained

Ranganatha Thathachariar v *Krishnaswami Thathachariar,* (1923) I.L.R 47 Mad. 139, *Sivan Pillai* v *Venkateswara Aiyar,* (1925) 22 L.W. 796, *Bangarammal* v. *Ramanuja Aiyangar,* (1925) 94 I.C. 610; *Abdul Hakim Baig* v *Mahomed Burramuddin,* (1925) I.L.R. 49 Mad 580 and *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee,* (1925) 49 M.L J. 25 (P.C.), followed

Appeal against the order of the District Court of Madura, dated 17th April, 1930 and made in O.P. No. 19 of 1930

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*C M A No 254 of 1930 and C.R.Ps. Nos. 1000 and 1001 of 1930. 23rd July, 1930

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and Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of Madura, dated 17th April, 1930 and made in O.P. No. 19 of 1930.

P. R. Ganapathi Aiyar and *T. R. Srinivasa Aiyangar* for appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

Anantakrishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—This appeal and the revision petitions arise out of an order passed by the learned District Judge of Madura, by which he appointed two new persons as trustees of the Ranga Chattram charities in the place of the two old trustees whose term of office expired after they had held office for five years under the scheme. One of the trustees whose term had so expired sought re-appointment and, as he was not re-appointed, he has preferred this Miscellaneous Appeal and the connected revision petition. Mr. Rajah Aiyar, who appears for the respondents, the newly appointed trustees, raised a preliminary objection that the appeal does not lie; and the answer of Mr. Ganapathi Aiyar was that the matter in dispute is really covered by section 47 of the Code of Civil Procedure and that an appeal lies. He also argues that we should in any event interfere under our revisional powers because, he says, that the learned District Judge was not entitled to make the appointment complained of, and that, in spite of the terms of the scheme decree, such an appointment could be made only in a suit instituted under section 92 of the Code after the necessary sanction had been obtained. I think it will be more convenient to deal with the second objection first. To appreciate Mr. Ganapathi Aiyar's argument it is necessary to refer to paragraphs 4 and 15 of the scheme. Paragraphs 4 runs as follows:—

"Each of the two trustees to be appointed by the Court should hold office for a term of five years but should be eligible for re-appointment, and any vacancy in the office of either of the said trustees shall be filled up by the Court."

Paragraph 15 is to the following effect:—

"Liberty is reserved for the parties to the suit or for the Advocate-General to apply to the Court with reference to the carrying out of the directions contained in the scheme"

Mr. Ganapathi Aiyar argued that the provision in paragraph 4 of the scheme only means that the Court, when approached under section 92, should have the power to appoint proper trustees in cases of vacancy. He also relied on the decision of the Full Bench in *Veeraraghavachariar* v. *The Advocate-General*

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Ananta-krishna Aiyar, J.

of Madras.[1] I am unable to agree with him. That decision only laid down that, in cases where it is sought to effect alterations or modifications of a scheme, the same could be effected only by proceedings taken under section 92 of the Civil Procedure Code. The question referred to the Full Bench was whether, in cases where liberty to apply is reserved to a person to ask for directions as to the carrying out of a scheme or to move the Court for alterations or modifications of the scheme, applications to have such things carried out could be made in the suit itself or whether the same could be done only by separate proceedings taken under section 92 of the Civil Procedure Code. At page 45 of the judgment of the learned Officiating Chief Justice, who delivered the opinion of the Full Bench, it is mentioned as follows:—

"A scheme having been framed, any modification or alteration of it is in effect a new scheme and the power to frame a new scheme is given only subject to the conditions specified in section 92."

In the present case, if by virtue of the liberty given by the scheme to apply to the Court, it be sought to effect alterations or modifications of the scheme, then, by virtue of the Full Bench decision, they can be effected only after proceedings are taken under section 92. But there is paragraph 4 of the scheme which I have already mentioned. It provides for the filling up of vacancies whenever such vacancies occur; and it says that any vacancy in the office of either of the said trustees should be filled up by the Court. I do not agree with the arguments of the learned advocate for the appellant that filling up vacancies under such provisions of the scheme amounts to either alteration or modification of the scheme. I put him the question whether he would contend that, if the scheme contained a provision for the filling up of vacancies by a vote of the majority of a Board of Electors, or by any specified authority, and such authority appointed particular persons to fill up the vacancies, the same also would come within the ruling of the Full Bench. If I understood him correctly, he was not prepared to go to that extent; and his argument was that in cases where the right to appoint is given to the Court the power of appointment could not be exercised as the provisions of section 92 are automatically attracted. I am unable to agree. In this respect I am unable to find any material difference between a case where under the scheme, the power to appoint is given to an outside body and one where such power is given to the Court itself. It, therefore, seems to me that the present is not a case where any modi-

1. (1927) I.L.R. 51 M. 31: 53 M.L.J. 792 (F.B.).

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fication or alteration of the scheme is asked for by virtue of any power to apply reserved under the scheme. If I am right in this view, it would follow that the Lower Court had jurisdiction to entertain the application and that we should not be justified in interfering in revision.

But the learned advocate argued that in that view the matter must be taken to be one arising in execution and falling within the scope of section 47 of the Civil Procedure Code, and that he would have a right of appeal. In support of that argument he relied on the decision of the Privy Council in *Ponnambalu Tambiran* v. *Sivagnana Desika Gnana Sambhanda Pandara Sannadhi*,[2] and that of a Bench of this Court in *Ramanathan Chettiar* v. *Balayee Ammal*.[3] After carefully considering the words of the decree which was the subject of comment by the Privy Council, I find that that case does not really lend support to his contention. The decree which was the subject of discussion before the Privy Council is found at page 339 of *Gnanasambanda* v. *Visvalinga*.[4] The decree is set out *in extenso* there, and I find that the operative portion of the decree was:

"That the Subordinate Judge of Kumbakonam in order to fill up the now vacant office of Tambiran of the Tiruppanandal Mutt do direct the appellant, etc (to name a Tambiran from among the Tambirans of his *adhinam*, competent to discharge the duties of managing Tambiran of the Benares (Kasi) Mutt at Tiruppanandal)."

The matter before the Court thus relates to the filling up of a then existing vacancy, and not to provide for the filling of all future vacancies should there be any, and it was with reference to the filling up of the actual vacancy which was the subject-matter of the suit that the litigation was carried to the Privy Council; and when the remarks of their Lordships of the Privy Council are read in the light of the wording of the decree in that case, I think that the judgment of the Privy Council does not support the contention of the appellant before us. The provision in paragraph 4 of the scheme before us is not for the filling up of any existing vacancy; and that, I think, is a material distinction between the case quoted by the appellant and the one before us. The other case referred to by the learned advocate. *Ramanathan Chettiar* v. *Balayee Ammal*,[3] a judgment of Ramesam and Cornish, JJ., was a case where the learned Judges specifically observed that they did not question the correctness of the numerous cases quoted before them, in which with reference to scheme suits generally it was held that the matter did not relate to execution and that an appeal did not lie; they

2 (1894) L.R. 21 I.A. 71. I.L R. 17 M 343 (P.C.).
3 (1927) 27 L.W. 32 4 (1890) I.L.R. 13 M. 338.

Sivaram Dubai v. Rajagopala Misra.

Ananta-krishna Aiyar, J.

distinguished the case before them on the ground that when specific directions were given in the scheme decree, then with reference to such directions the decree would be an executable decree. They, however, felt some doubt on the question, and accordingly resolved to treat the matter before them as coming under cl. (2) of section 47 under which Courts are given discretion to allow a petition filed under that section to be treated as a plaint. Both the learned Judges refer to this aspect of the case, and they finally resolved to treat the proceedings before them as a plaint as there was no other objection to their doing so.

Having thus disposed of the two cases on which reliance was mainly placed by the learned advocate for the appellant, I may state that our attention was drawn by the learned advocate for the respondents to numerous cases where this Court held that an appeal does not lie in such cases, and that such matters could not be taken to be matters arising under section 47 of the Code: *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar*[5] (Oldfield and Venkatasubba Rao, JJ.), *Sivan Pillai* v. *Venkateswara Aiyar*[6] (Spencer and Madhavan Nair, JJ.), *Bangarammal* v. *Ramanuja Aiyangar*,[7] (Devadoss and Waller, JJ.), *Abdul Hakim Baig* v. *Burramiddin*[8] (Devadoss and Wallace, JJ.), are among the cases to which our attention was drawn by the respondents' learned advocate. It was there held that in such cases section 47 would not apply. I do not see any reason for not following those cases; more especially as the observations of the Privy Council in the Dakore case, *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*,[9] seem to lend support to the contention of the respondents.

For the above reasons I hold that no appeal lies in this case under section 47, Civil Procedure Code, and I would accordingly dismiss the appeal with costs. I would fix the pleader's fee at Rs. 250.

I have already mentioned that the Lower Court had jurisdiction to proceed to make the appointments by virtue of the provisions of clause (4) of the scheme and that the decision of the Full Bench in *Veeraraghavachariar* v. *The Advocate-General of Madras*[1] does not support the contention of the petitioner that the Lower Court had no jurisdiction to do so. That being so, I would dismiss the revision petitions also, but, in the circumstances, without costs.

1 (1927) I.L.R. 51 M 31 53 M.L J. 792 (F.B)
5. (1923) I.L.R. 47 M. 139 6 (1925) 22 L.W 796
7 (1925) 94 I.C 610 8 (1925) I.L.R. 49 M 580.
9. (1925) 49 M.L J. 25 (P.C.).

No orders are necessary on the Miscellaneous Petitions.

Reilly, J.—I agree that in this case no appeal lies both because, as my learned brother has pointed out, the proceedings before the District Judge were not proceedings within section 47 of the Code arising in execution and because the parties concerned are not parties to the suit. But the most interesting and important part of Mr. Ganapathi Aiyar's contention was that clause (4) of the scheme for this trust, under which the District Judge has appointed the two respondents trustees, is *ultra vires*, having been made in a scheme suit under section 92 of the Code of Civil Procedure, but according to his contention being in conflict with the Full Bench decision of this Court in *Veeraraghavachariar* v. *The Advocate-General of Madras.*[1] In this case we are fortunate in the fact that my learned brother was a member of that Full Bench, and he has expounded the decision of the Full Bench. As he has pointed out, it was there laid down that, if a scheme made in a suit under section 92 of the Code provides for liberty to apply for the modification of that scheme, then that provision is *ultra vires;* and, as I understand the case, it was also decided that, if the scheme provides for liberty to apply for directions, those directions cannot extend to anything which the Court is empowered to do under section 92 of the Code. Mr. Ganapathi Aiyar urges that under that section the Court has power to appoint a new trustee; and from that he argues on the strength, as he says, of the Full Bench decision, that any provision in a scheme made under the section that a trustee shall be appointed to fill a vacancy by the Court is *ultra vires.* To my mind the selection and appointment of a trustee by the Court in accordance with such a scheme when a vacancy occurs is a very different thing from the appointment of a new trustee referred to in the section. If we look at the section, we find that under it the question of the Court appointing a new trustee arises only when the direction of the Court is deemed necessary for the administration of the trust. That may happen when a trustee is removed by the Court and no other machinery for replacing him comes into play or when a direction in the matter is required in other circumstances. But, when a scheme has provided regular machinery for the appointment of a trustee if a vacancy occurs, no direction of the Court is required for working that machinery in an ordinary case or in a case such as this. The machinery is there ready for use; and it does not appear to me to make any difference whether the machinery set up by the scheme is a Court which would have

1. (1927) I.L.R. 51 M. 31: 53 M.L.J. 792 (F.B.).

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Reilly, J.

jurisdiction in a suit under section 92 of the Code or any other body or person. In my opinion, therefore, the provision in this scheme that, when vacancies occur among the trustees other than the life-trustee, the vacancies shall be filled by the District Court is not in any way in conflict with the interpretation of section 92 of the Code by the Full Bench in *Veeraraghavachariar* v. *The Advocate-General of Madras*.[1]

I agree that this appeal and the revision petitions should be dismissed. I also agree with the order proposed by my learned brother as to costs.

K.C. *Appeal and revision petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Gopal Naick and others .. *Petitioners** (*Accused Nos.* 1 *to* 5, 7 *and* 8)

v.

Alagirisami Naick .. *Respondent* (*Complainant P.W.* 1).

Gopal Naick v. Alagirisami Naick.

Criminal Procedure Code (*V of* 1898), *Ss.* 494, 202, 156 *and* 159—*Public Prosecutor allowing vakil to carry on the prosecution—No formal withdrawal—Effect of—Complaint referred by Magistrate to the Police—Powers of the Police*

In the absence of a formal withdrawal of the prosecution the fact that the Prosecution Inspector allowed the vakil for the complainant to conduct the case will not entitle the accused to be acquitted

When a complaint is referred under S 202, Criminal Procedure Code, by the Magistrate to the Police for enquiry and investigation, the Police need no more than report But that does not debar the Police from exercising their ordinary powers of arrest and investigation *Emperor* v. *Haji Nur Mahomed,* (1928) I.L.R. 53 Bom. 339, dissented from, *King-Emperor* v *Bhola Bhagat,* (1925) I.L.R. 2 Pat 379, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Koilpatti, dated 6th March, 1930 and passed in Criminal Appeal No. 6 of 1930 preferred against the judgment of the Court of the 2nd Class Magistrate of Sankaranainarkoil in C.C. No. 596 of 1929.

K. S. Jayarama Aiyar and *G. Gopalaswami* for petitioners.

P. Govinda Menon for *The Public Prosecutor* on behalf of the Crown.

T. Krishnamachari for complainant.

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*Cr R. C. No 367 of 1930. 19th December, 1930
(Cr. R. P No. 343 of 1930.)

1 (1927) I.L.R. 51 M 31 53 M.L.J. 792 (F.B.).

Gopal Naick v. Alagirisami Naick.

The Court made the following

ORDER.—The first point is that the Public Prosecutor having withdrawn from the case, the accused must be acquitted. It does not appear that there was formal withdrawal from the prosecution under section 494. The Prosecution Inspector simply dropped out and let a vakil carry on the prosecution in what was practically a private complaint.

The second point is whether the Police on receiving information in a complaint forwarded under S. 202 can investigate under S. 156. The Police need no more than report; but if they choose to investigate, it is not illegal.

If *Emperor* v. *Haji Nur Mahomed*[1] is to the contrary, I respectfully disagree. In In re *Arula Kotiah*[2] it was held that a Magistrate having taken cognizance of a complaint is bound, if he decides to delay process under S. 202, to call for a report and cannot act under S. 156 (3); but this ruling does not affect the powers of the Police. It would be a strange state of the law if a dangerous murderer was at large and the Police could not arrest him because some misguided person had already lodged a complaint so suspiciously false that the Magistrate had called for a report. *King-Emperor* v. *Bhola Bhagat*[3] is to the same effect.

The petition is dismissed.

S.R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Venkatarama Aiyar .. *Appellant** (*1st Plff.*)

v.

Mirthinjaya Aiyar and another .. *Respondents* (*Defts.* 1 *and* 2).

Venkatarama Aiyar v. Mirthinjaya Aiyar.

Limitation Act (IX of 1908), S 6, Sch I, Art 126—Minor—Child in the womb—Alienation by Hindu father—Suit by after-born son to avoid—Commencement of limitation

A person cannot be said to be a minor until he is born and therefore the provisions of S. 6 of the Limitation Act do not apply to the case of a son who was begotten before but was born subsequent to the alienation objected to.

Where in a suit to set aside an alienation made by a Hindu father it was proved that the plaintiff was in his mother's womb on the date of the alienation in question and was born subsequently and it appeared that the

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*S.A. No. 1525 of 1927. 11th November, 1930.

1 (1928) I.L.R. 53 B. 339

2 (1911) 10 M.L.T. 120: 12 Cr. L.J. 463.

3 (1925) I.L.R. 2 Pat 379.

Venkatarama Aiyar v. Mirthinjaya Aiyar.

suit had been instituted more than twelve years after the alienee took possession but within three years of the plaintiff attaining majority,

Held, that the suit was barred by Art 126 of the Limitation Act and that the plaintiff was not entitled to the exemption provided for by S 6 of the Act.

Miran Ditta v *Behari Lal*, (1920) 54 I C. 838; *Dhanraj Rai* v. *Ram Naresh Rai*, (1924) 79 I.C. 1019 and *Muhammad Khan* v *Ahmad Khan*, (1928) I.L.R. 10 Lah. 713, followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in A.S. No. 55 of 1925 (A.S. No. 51 of 1925 on the file of the District Court, East Tanjore) preferred against the decree of the Court of the District Munsif of Shiyali in O.S. No. 247 of 1922.

M. Patanjali Sastri for appellant.

K. Krishnaswami Aiyangar and *A. Seshachariar* for respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. The only question of law for decision in this Second Appeal is whether the plaintiff's suit to set aside the alienation made by his father of 45 cents of land included in the sale-deed, Ex. C, is barred by limitation under Art. 126 of the Limitation Act.

Both the Lower Courts have found that the alienation was not supported by necessity and this finding has not been questioned before me. Art. 126 of the Limitation Act provides 12 years as the period of limitation for a suit by a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property. The starting point of limitation is the date "when the alienee takes possession of the property." The alienation was made on 26th June, 1901, and it is admitted that the alienee took possession of the property on the same date. The suit having been brought only on 16th August, 1922, that is, more than 21 years after the date of taking possession by the alienee, *prima facie* is barred by limitation under Art. 126. On 26th June, 1901, when the alienee took possession of the property the appellant was in his mother's womb and was not born. He was born only on 18th August, 1901. Section 6 (1) of the Limitation Act provides that

> "Where a person entitled to institute a suit . . . . is, at the time from which the period of limitation is to be reckoned, a minor . . . . he may institute the suit . . . within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule."

On behalf of the appellant it is argued that he is entitled to claim the benefit of S. 6 of the Limitation Act and that the

Venkatarama Aiyar v. Mirthinjaya Aiyar.

plaintiff, though he was not born on 26th June, 1901, should be deemed to be a minor at that date as he was in his mother's womb and that the period of limitation should be reckoned from the date of his birth, 18th August, 1901. If this is permissible, then the suit will be within time having been instituted two days before the lapse of time. The appellant's argument is based on the ground that a child in the mother's womb is supposed to be born for certain purposes such as for partition and the making of a will, etc. He argues why should not, on the same reasoning, a child in the mother's womb be regarded as a minor for purposes of S. 6 of the Limitation Act? On the other hand, the respondents argue that the term "minor" used in S. 6 can be understood only with reference to persons physically in existence and that it is meaningless to apply it with respect to an unborn being in the womb. The question is whether the plaintiff who was born on 18th August, 1901, should be deemed to be a minor on 26th June, 1901, when the alienee took possession of the property.

This question has not arisen for decision in this Court. In the Punjab Chief Court, the Lahore High Court and the Allahabad High Court the view of S. 6 suggested on behalf of the appellant has not been accepted. In *Kehar Singh* v. *Hasara Singh*[1] it was held by Chevis, J., of the Punjab Chief Court, that S. 6 of the Limitation Act does not apply to the case of a son who is born subsequent to the alienation objected to and the minority begins at birth and not at conception. In *Miran Ditta* v. *Behari Lal*[2] it was held by the Lahore High Court that

"the principle of law is perfectly clear that a plaintiff cannot take advantage of the exemption (provided in S 6 of the Limitation Act) unless he is a minor and in existence at the time when the right to sue accrues and that a minor is not entitled to the benefit of the provisions of S. 6 in respect of a right to sue which accrued before his birth"

In *Muhammad Khan* v. *Ahmad Khan*[3] the same proposition was again affirmed. The judgment of the learned Chief Justice in this case is very instructive as it deals with the special reasoning on which the appellant's argument is based. He observes thus:

"We are aware of the legal fiction by which a child in the mother's womb is supposed to be born for certain purposes, but the learned counsel for the appellant has not been able to invite our attention to any authority in support of his argument that this fiction governs the rule laid down by the statute. If a son in embryo is deemed to be a minor in existence on

1. (1912) 14 I.C. 60. 2 (1920) 54 I.C. 838.
3. (1928) I.L.R. 10 Lah. 713.

Venkatarama Aiyar *v.* Mirthinjaya Aiyar.

the date of the conception, the period of eighteen years, which would determine his disability, would run from that date But it is clear that that date can never be ascertained with any degree of certainty, and the contention urged by the learned counsel would lead to the absurd result that the plaintiff would attain the age of majority for the purposes of the law of limitation when he was only 17 years and a few months old, though he would be a minor at that time for all other purposes''

"There can be little doubt that a person cannot be held to be a minor until he is born This proposition is so obvious that it does not require any authority, but I find that the matter is by no means *res integra*"

He then refers to the decision in *Miran Ditta* v. *Behari Lal*[1] and *Kehar Singh* v. *Hasara Singh*.[1] To the same effect are also the decisions of the Allahabad High Court. See *Sankat Narain Pande* v. *Ram Bharos*[4] and *Dhanraj Rai* v. *Ram Naresh Rai*[5]; and the Oudh Chief Court has also taken a similar view in *Chokhey Singh* v. *Hardeo Singh*.[6] Having regard to the express language of S. 6 of the Limitation Act which in terms refers to a "minor" I do not think that any other view is possible. In my opinion a person cannot be held to be a minor until he is born. Section 3 of the Indian Majority Act of 1875 relied on by the appellant which states that

". . . Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before"

does not in any way help us in deciding this question. Following the decisions referred to above, I hold that the appellant could not be said to have been a minor at the time of the sale though he was in his mother's womb at that time.

The rest of the case deals with only questions of fact.

In the result, the second appeal fails and is dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Nanureddigari Lakshmireddy .. *Petitioner** (*Complainant*)

v.

Ugranapalli Muni Reddy .. *Respondent* (*Accused*).

Lakshmireddy *v.* Muni Reddy.

Criminal Procedure Code (V of 1898), Ss 350 and 436—Order of discharge passed by Magistrate—Sessions Judge directing further inquiry—Change of Magistrates during interval—Power of new Magistrate to proceed on evidence recorded by predecessor—Erroneous order of transfer—

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*Cr. M P No 660 of 1930 30th September, 1930.

1. (1912) 14 I.C. 60 2 (1920) 54 I.C. 838.
4. (1924) 79 I.C. 1010 5. (1924) 79 I.C. 1019.
6. (1921) 64 I.C. 757.

Lakshmi-reddy v. Muni Reddy.

Absence of prejudice to party—Order whether can be allowed to stand—Order of Magistrate—Need for containing rulings relied on

Where a Sessions Judge acting under S 436, Criminal Procedure Code directed further inquiry and returned the case to the Original Court, namely, the Stationary Sub-Magistrate, but during the interval there had been a change of Magistrates and the new Magistrate after posting the case for inquiry framed a charge without re-examining the witnesses already examined and thereupon the accused petitioned the District Magistrate who transferred the case holding that the procedure adopted was illegal,

Held, that the proceeding before the new Magistrate was a part of the inquiry originally started and the procedure adopted by the Magistrate in acting on the evidence recorded by his predecessor was permitted by the provisions of S 350 of the Code of Criminal Procedure.

Queen-Empress v *Hasnu,* (1884) I.L.R. 6 All 367, doubted

Ram Dial v *Emperor,* (1912) 13 Cr L J. 255, *Queen-Empress* v *Balasinnathambi,* (1891) I L.R. 14 Mad 334: 1 M L.J. 343 (F.B) and *Palanandy Goundan* v. *Emperor,* (1908) I.L.R. 32 M 218, referred to

Held further, that the order of transfer passed by the District Magistrate should be set aside An erroneous order of transfer cannot be allowed to stand merely because there is no real hardship to any party, the better rule in such cases being to restore the *status quo ante*

Semble: It is desirable that a Magistrate who relies on certain rulings cites those rulings in his order so that the parties and the revisional Court may not be left in the dark.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing re-transfer of C.C. No. 178 of 1930 on the file of the Court of the Stationary Sub-Magistrate of Tirupathi and transferred to the file of the Court of the Stationary Sub-Magistrate of Puttur and numbered as C.C. No. 277 of 1930, by the order, dated 6th August, 1930, of the Court of the District Magistrate of Chittoor in Cr. M. P. No. 15 of 1930 from the file of the Court of the Stationary Sub-Magistrate of Puttur to the file of the Court of the Stationary Sub-Magistrate of Tirupathi.

B. Somayya and *V. Satyanarayana* for petitioner.

The Acting Public Prosecutor on behalf of the Crown.

S. Subramania Aiyar for respondent.

The Court made the following

ORDER.—On examining the record of C.C. No. 504 of 1929, the Sessions Judge of Chittoor, acting under S. 436, Criminal Procedure Code, directed further inquiry and returned the case to the Original Court, that of the Stationary Sub-Magistrate of Tirupathi. Meanwhile there had been a change of Magistrates and the new Magistrate after posting the case for inquiry, framed a charge without re-examining the witnesses already examined. Thereupon the accused petitioned the District Magistrate of

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Chittoor, who transferred the case, holding that the procedure adopted by the Sub-Magistrate was illegal, and diametrically opposed to the authoritative rulings. The learned Magistrate has not cited these rulings, but reserved them for a separate instruction to the Sub-Magistrate, a course that cannot be commended, because it leaves the parties and the revisional Court entirely in the dark. However, the learned Public Prosecutor says that the rulings relied upon are *Queen-Empress* v. *Hasnu*[1] and *Ram Dial* v. *Emperor.*[2]

In *Queen-Empress* v. *Hasnu* [1] a District Magistrate himself conducted a further inquiry into a case discharged by a Deputy Magistrate and framed a charge upon the evidence recorded by the Deputy Magistrate. This was held to be irregular.

In *Ram Dial* v. *Emperor,*[2] which is also an Allahabad case, it is ruled that further inquiry means that the evidence should be taken *de novo,* and does not contemplate a mere re-perusal of evidence already recorded. This latter case carries no authority in Madras for it is opposed to the Full Bench decision in *Queen-Empress* v. *Balasimmathambi,*[3] where the matter is very clearly discussed by Shephard, J. The question is how far the matter is covered by S. 350, Criminal Procedure Code. A Magistrate has recorded the evidence in an inquiry, ceases to exercise jurisdiction, and is succeeded by another Magistrate who has jurisdiction; may the Magistrate so succeeding act on the evidence recorded by his predecessor? The learned Public Prosecutor would draw a distinction between cases where there has been a change of Magistrates in the course of the inquiry in the original Court, and where the inquiry has been closed by one Magistrate in the original Court by an order of discharge, and then re-opened by the Sessions Judge when another Magistrate has succeeded. This circumstance does not seem to carry the case out of the purview of S. 350. It is the same inquiry until, on framing the charge, the proceedings become a trial, and the fact that there was an erroneous order of discharge, set aside by the Sessions Judge, is a mere incident in the course of that inquiry. When an inquiry was transferred from one Magistrate to another it was held to be the same inquiry, and section 350 was applied (*Palaniandy Goundan* v. *Emperor,*[4] following *Mohesh Chandra*

1. (1884) I L.R. 6 A. 367. 2 (1912) 13 Cr L.J. 255
3 (1891) I.L.R. 14 M 334 · 1 M.L.J. 343 (F.B).
4. (1908) I.L.R. 32 M. 218.

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Saha v. *Emperor*[5]) and it is very doubtful whether, in the light of these rulings, *Queen-Empress* v. *Hasnu*[1] (where the District Magistrate in effect transferred the case to his own file) is still good law.

Mr. Somayya, who appears for the petitioner, has cited *Ramanathan Chettiar* v. *King-Emperor*,[6] under the impression that the District Magistrate takes exception to the Sub-Magistrate's refusal to hold a *de novo* inquiry at the accused's request; but I do not gather that that point was ever in question. Of course the accused's right under section 350 is confined to trials and does not extend to inquiries. Nor do I gather that literal stress is laid upon the word "immediate." It is not suggested that the Sub-Magistrate framed the charge so immediately that he did not even peruse the record.

It is urged that the transfer ordered by the District Magistrate is no real hardship to any party and should be allowed to stand. The better rule when there has been any error is to restore the *status quo ante* and to allow the ordinary jurisdiction to prevail. Accordingly the order of the learned District Magistrate is set aside and the procedure of the Sub-Magistrate of Tirupathi is affirmed.

B.V.V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE CORNISH.

R. N. Samuvier and another .. *Appellants** (*Plffs.*)

v.

R. N. Ramasubbier .. *Respondent* (*Deft.*).

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Registration Act (XVI of 1908), S 17—Partnership—Dissolution of—Assignment of interests by partner—Partnership assets including immovable property—Necessity for registration—Indivisibility of agreement—Clause relating to payment of money—Enforcement of—Admissibility of agreement for purpose of—Part-performance—Limits of the doctrine

An agreement by which a partner assigns his interests in a firm owning immovable property in favour of another partner requires to be registered under S. 17 of the Registration Act.

On the dissolution of their partnership, the plaintiff and defendant executed the suit agreement by which each of them mutually assigned his

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*Appeal No. 21 of 1929 8th January, 1931.

1. (1884) I.L.R. 6 A. 367.

5 (1908) I.L.R. 35 C 457. 6. (1922) I.L.R. 46 M. 719.

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interests in the partnership property in favour of the other so that each of them acquired exclusive interests in the immovable property of the firms originally held by them jointly By the same agreement, the defendant also undertook to pay the plaintiff a debt due from one of the firms to the other The agreement was not registered and in a suit by the plaintiff to realise the debt,

Held, (1) on a construction of the agreement and the circumstances in which it was brought about, the agreement embodied the contract between the parties. It was not merely a document creating a right to obtain another nor was it merely a memorandum of an agreement previously made. *Subramaniam* v *Lutchman*, (1922) L.R. 50 I.A. 77: I L R. 50 C 338 44 M L J 602 (P.C.) and *Skinner* v. *Skinner*, (1929) L.R. 56 I.A 363: I.L R. 51 All 771. 57 M.L.J. 765 (P.C.), referred to

(2) A partner, it is true, has no right to any specific items of partnership property; but a partner in a firm the assets of which include immovable property, unlike a shareholder in a joint stock company, holds an interest in that property and a dissolution of partnership operates as a transfer of that interest The agreement in suit, in so far as it affected immovable property of more than Rs. 100 in value, is therefore inadmissible in evidence. *Venkataratnam* v. *Subba Rao*, (1926) I.L.R. 49 Mad 738: 51 M.L.J. 410, dissented from. *Joharmal* v. *Tejram Jagrup*, (1892) I.L.R. 17 B 235 and *Ashworth* v *Munn*, (1880) 15 Ch. D 363, referred to

(3) If there are two distinct provisions in a contract, the one relating to rights in immovable property and the other to the payment of money, proof of the latter provision can be given though the document is not registered. But where, as in this case, the contract consists of a number of counterbalancing terms, some affecting immovable property and some not, so inextricably mixed up that it can only be regarded as a single and indivisible transaction, no part of the agreement is admissible in evidence for the enforcement of any of its terms.

Lakshmamma v. *Kameswara*, (1889) I.L.R. 13 Mad. 281; *Thandavan* v. *Valliamma*, (1892) I L.R. 15 Mad. 336 2 M.L.J. 130; *Hanmant Appa Rao Deshpande* v *Ramabai Hanmant Meghashyam*, (1919) 21 Bom L R 716; *Pasupati Venkatapathiraju* v *Vatsavaya Venkata Subhadrayamma*, (1918) 47 I.C. 563 and *Vyravan Chetty* v *Subramaniam Chetty*, (1920) L.R. 47 I.A. 188: I.L.R. 43 Mad. 660: 39 M.L.J. 37 (P.C), referred to.

Pothi Naicken v. *Naganna Naicker*, (1915) 30 M.L.J. 62 (F B) and *Bisheshar Lal* v. *Mt. Bhuri*, (1920) I.L.R. 1 Lah. 436, relied on

Per *Cornish*, *J*—The doctrine of part-performance is of no avail in the face of the stringent provisions of S. 49 of the Registration Act. *Arseculeratne* v. *Perera*, (1928) A.C 173, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O.S. No. 28 of 1925.

S. Varadachariar and *P. R. Srinivasan* for appellants.

T. M. Krishnaswami Aiyar, *T. M. Ramaswami Aiyar* and *K. Venkateswaran* for respondent.

The Court delivered the following

Curgenven, J.

JUDGMENTS. *Curgenven, J.*—The plaintiff, who appeals, brought this suit against his brother for a sum of Rs. 18,800-3-1. The learned Subordinate Judge has narrated in full the circumstances leading up to the claim. To understand how it arose,

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it is only necessary to explain that there were two firms in which both parties were partners. One of these firms worked under the Vilasam V.S.R.S., and in it one Sankaranarayana Ayyar had a half share while the two brothers had the other half share. It was a money-lending business, and it also ran a chit fund. The other firm was known to the R. S. Firm; it was also engaged in money-lending, and the plaintiff and defendant were the partners. The two firms had dealings each with the other. In 1923 disagreements arose between the brothers, and they decided to dissever their interests. By an agreement Ex. K, dated the 4th June of that year, the plaintiff purported to take over all the defendant's interests in the V. S. R. S. Firm, while those of the plaintiff in the R. S. Firm were assigned to the defendant. The latter at the same time accepted liability for a sum of Rs. 13,000 and odd due by the R. S. to the V. S. R. S. Firm. Later, in February in 1925, Sankaranarayana Ayyar and the plaintiff dissolved their partnership in the V. S. R. S. Firm, and it was arranged that the debt due from the R. S. Firm, which by that time amounted to Rs. 18,340-6-1, should be taken over by the plaintiff. It is this sum that formed the subject-matter of the suit.

The defendant raised a number of legal objections to the claim and it is with these that we are concerned. The first part of the argument is based upon the circumstance that the agreement, Ex. K, between the parties was not registered. It purported, as we have seen, to dissolve two partnerships, and since each partnership involved immovable property, title to which necessarily, it is contended, underwent modification, the whole document is subject to the disqualifications imposed by S. 49 of the Registration Act, it can neither affect the property nor be received as evidence of any transaction affecting it. Several replies have been attempted to this objection. In the first place the actual transaction is assigned to an anterior date, when the document would be no more than a record of an earlier oral agreement, and not itself the embodiment and sole repository of the contract. But supposing this contention to fail, it is urged that the objection with regard to registration does not apply where a partnership involving immovable property is dissolved; or if, again, this position is not maintainable, some parts of the transaction, and in particular that part which gives rise to the present claim are not affected. A further line of defence resorted to by the defendant is that the plaintiff has not acquired the right to sue by a valid assignment of the actionable claim.

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There can be no doubt, in my view, that the agreement of 4th June, 1923, was, and was intended by the parties to be, the instrument of dissolution. It was not the less so merely because the operations thereby involved could not all be executed upon the day upon which the document was signed, but some came into force earlier and some were left to be done later. Thus it may be, as the plaint recites, that from some day in May the parties began to open separate accounts, but the document itself recognises the necessity for registered conveyances, and provides that they should be subsequently executed. The document is formal in design, and opens with the words "agreement entered into on 4th June, 1923." The plaint (para. 4) gives its date as the date up to which the parties carried on their transactions as joint partners. In paragraph 11 it is referred to as having been "confirmed and brought into force," and other similar expressions occur elsewhere. Allusion to earlier dates on which certain changes involved in the two dissolutions were introduced does not, in my view, go far to show that what was clearly drafted as a written agreement should be discarded in favour of a prior oral one. There are indications in the evidence that it was not until trouble was apprehended from this source that such a theory took shape. Thus the plaintiff, when examined on 11th February, 1928, said that when division was effected on 24th May, 1923, "it was decided that an agreement should be drawn up and executed in duplicate and each should keep one as a voucher to evidence the arrangements come to." On the 16th February he made the incompatible assertion that "at the time of the division of the assets there was no intention to reduce to writing the arrangements come to," and went on to say that Ex. K was drawn up merely as a record of an already completed division. Another contradiction of this construction is to be found in his lawyer's notice to the defendant, Ex. VI. I have no doubt that the written agreement was, in the words of Couch, C.J., quoted by their Lordships of the Privy Council in *Subramonian* v. *Lutchman*,[1] "what the parties considered to be the only repository and appropriate evidence of their agreement" and under S. 91 of the Evidence Act, can alone be looked at for the terms of it.

The next point is whether the document could effect its purpose without registration. As has been said, it sets out to dissolve two partnerships, making various dispositions, which need not be given here in detail, with regard to the movable and immovable

1. (1922) L.R. 50 I.A. 77: I.L.R. 50 C. 338: 44 M.L.J. 602 (P.C.).

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property until then held by each firm. I would here record my view, in reply to an argument addressed to us, that the terms of this deed can only be construed as actually assigning rights in the immovable property, and not, as is provided for by S. 17 (2) (*v*) of the Registration Act, "merely creating a right to obtain another document which will, when executed, create," etc., rights in the property; so that, as has been laid down by the Privy Council in *James Skinner* v. *R. H. Skinner*,[2] it cannot escape the provisions of the Act merely because paragraphs 15 and 16 of it may contemplate the execution and registration of other documents. In *Venkataratnam* v. *Subba Rao*[3] Phillips and Madhavan Nair, JJ., have held that a document of the nature of Ex. K does not require registration, but with all respect I am unable to adopt the reasoning upon which that decision is based. The theory underlying it is that both before and after a partner releases his rights the property is and still remains the property of "the partnership," meaning by that phrase, I think the learned Judges would have conceded, a legal entity which does not itself undergo change. But this is surely to lose sight of the fact that "if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members" [Contract Act, section 253 (7)]. Accordingly where, to take the case of the V.S.R.S. Firm as an example, there is a partnership of three persons, and one goes out, the whole partnership is dissolved. If the remaining two persons resume business as partners, it can only be by the formation, tacit or express, of a fresh partnership. If the original partnership of three held immovable property, and it afterwards vests in the new partnership of two, it can surely only be by a transfer of interest from the one to the other. The analogy drawn between partners in a firm and shareholders in a joint stock company does not seem to be a true one, because whereas a company is a judicial person, and its identity is unaffected by the transfer of its shares, a partnership is, legally speaking, only an aggregate of individuals and changes with very change of *personnel*. Some discussion of this point by the Court of Appeal will be found in *Ashworth* v. *Munn*,[4] one of the *Mortmain* cases referred to in the next stage of the argument. It is worth remark that S. 17 of the Registration Act excludes from its provisions "any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property,"

2 (1929) L.R. 56 I.A. 363· I.L.R. 51 A. 771. 57 M.L.J. 765 (P.C.).
3 (1926) I.L.R. 49 M. 738. 51 M.L.J. 410.
4. (1880) 15 Ch.D. 363.

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which may perhaps justify the inference that in similar circumstances the exclusion of instruments relating to partnerships was not contemplated by the framers of the Act, and certainly shows an intention to distinguish between such companies and ordinary partnerships.

Assuming then that a partner in a firm possessing immovable property holds an interest in that property, it would seem to follow that upon a dissolution a transfer of that interest takes place. The question whether he does hold such an interest has been elaborately discussed by Jardine and Telang, JJ., in *Joharmal v. Tejram Jagrup*,[5] where the English case-law dealing with the subject has been considered at length. The former learned Judge admitted that the tendency of decisions in England had been to bring partnership agreements conveying interests in land among other assets within S. 4 of the Statute of Frauds, as had been done under the Statute of Mortmain, and although he seems to have inclined towards the general proposition that in India a document transferring a share in the assets, including immovable property, of a firm, does not require registration I do not find that he expressly committed himself to that view. Telang, J., gave reasons for adopting the contrary position, in which I would respectfully express my concurrence. To go no further than to the provisions of the Contract Act, under S. 253 all partners, in the absence of a contract to the contrary, are joint owners of the partnership property; and although certain restrictions are imposed upon them, *qua* partners, in dealing with their shares in that property, that does not make them the less joint owners, and, if joint owners they be it is difficult to see how they can be said not to possess an interest in the property. The same considerations apply of course even more plainly where, as here with the R. S. Firm, a partnership of two undergoes dissolution. Each ex-partner acquires certain sole interest in immovable property by the conversion of rights previously held jointly. I conclude then that the agreement Ex. K cannot operate to affect the immovable property of which it treats, and in so far at least as it evidences a transaction affecting immovable property, it is inadmissible in evidence.

The appellant next contends that we may take the terms of the agreement piecemeal, and enforce any not directly affecting immovable property, among these latter being the suit claim. The question first arising here is does it even operate to dissolve the two partnerships? Analogy sought in the severance of joint

5. (1892) I.L.R. 17 B. 235.

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status among the members of a Hindu family is, I think, likely to be fallacious. We are here dealing not with status but with contract. In *Gray* v. *Smith*[6] Kekewich, J., held that an agreement by one of the partners to retire and to assign his share in the partnership assets, including immovable property, is an agreement to assign an interest in land and falls within the Statute of Frauds, a decision which, although not argued, was approved by the Court of Appeal. But it does not seem necessary here to settle this point, because I think that the authorities are clear that where a contract comprises a number of counterbalancing terms, some affecting immovable property and some not, designed as an indivisible whole to effect a fair distribution of assets, you cannot pick out such of those terms as do not relate to immovable property and enforce them regardless of the consequences of such a course. The decision in *Lakshmamma* v. *Kameswara*[7] has been criticised as giving weight to prior cases decided under the Registration law as it stood before 1877, when the document could not be received in evidence for any purpose. It was a partition case, and the learned Judges held that the transaction was one and indivisible, so that the partition of the movable property could not be separated from the partition of the rest. In *Thandavan* v. *Valliamma*[8] a partition of movables effected by an unregistered instrument which dealt also with the immovable property was held to be valid, but it will be found that the one-third share claimed in the movables was quite separable from and independent of the share in the immovable property. The Court has, it is said, to ascertain whether "the part which is void be in its own nature separable and indivisible." Another case dealing with separable movable property, and citing the case last referred to with approval, is *Hanmant* v. *Ramabai*.[9] So too where there is a lien or charge upon property partly movable and partly immovable, effected by an unregistered document, the charge may be enforced upon the movable property: see *Pasupati Venkatapathiraju Garu* v. *Vatsavaya Venkata Subhadrayamma*.[10] These cases are merely illustrations of contracts with separable terms. In *Vyravan Chetty* v. *Subramanian Chetty*,[11] which related to an agreement to divide equally the proceeds of a first and second mortgage, all that their Lordships of the Privy Council decided was that for

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6 (1889) 43 Ch D. 208. 7 (1889) I.L.R. 13 M 281
8. (1892) I.L.R. 15 M. 336: 2 M.L.J. 130
9 (1919) 21 Bom. L.R. 716. 10 (1918) 47 I.C. 563.
11. (1920) L.R. 47 I.A. 188: I.L.R. 43 M. 660: 39 M.L.J. 37 (P.C.).

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the purpose of a claim to half the proceeds, the document, although unregistered, could be given in evidence. No question of the inherent divisibility or indivisibility of a transaction into its component parts really arose. An instance of a document effecting partition of movables and immovables, which was considered not to be enforceable as regards movables only, is afforded by a Full Bench case of this Court, *Pothi Naickan* v. *Naganna Naicker*.[12] The principle accepted was that "when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts, in which case they are severable." This case was referred to as the law upon the point in *Perumal Ammal* v. *Perumal Naicker*,[13] although the kind of transaction dealt with there, being a gift of movable and immovable property, stands upon a different footing and no question of upsetting the balance of a bilateral contract arises. Where a party relinquished his claim to property, comprising movables and immovables, in consideration of a sum of Rs. 1,000, it was held in *Bisheshar Lal* v. *Mussammat Bhuri*,[14] that as this consideration could not be apportioned between the real and personal estate the document could not be admitted for any purpose whatever.

The conclusion to be derived from these cases is that no hard and fast rule can be drawn as to the divisibility, and therefore the enforceability, of some terms in a contract apart from the remainder. If justice can be done between the parties by a partial enforcement, the Court will enforce, and not otherwise. Turning now to the document before us, I think I am right in saying that Mr. Varadachariar for the appellants has not attempted to show that, on this principle, the suit amount can be separated from the other property dealt with. In the first place, the plaintiff takes over the defendant's interest in the V. S. R. S. Firm and the defendant, the plaintiff's interest in the R. S. Firm, with an indemnity clause in each case. Then the brothers owned an extent of wet land, of which the plaintiff was to receive 70 acres 60 cents, and the defendant the remainder (area not stated, but said to be considerably less). The plaintiff was to have all the outstandings, and to meet the liabilities of another business, known as the Munnirpallam

12. (1915) 30 M.L.J. 62 (F.B.).
13. (1920) I.L.R. 44 M. 196 40 M.L.J 25.
14. (1920) I.L.R. 1 Lah 436

business, hitherto jointly owned. There were several other assignments of property, some of it immovable, which I need not particularise. It is evident therefore that if, on the footing of this agreement, the defendant is held solely liable for the suit item, as a liability of the R. S. Firm assumed by him under it, it must be in entire disregard of the consideration which led him to assume that liability. In the case of such a contract as this, the terms of which are inextricably united, the only course, in my view, is to regard it as a single transaction affecting immovable property, within the meaning of section 49 of the Registration Act, and to decline to receive the document as evidence of any of its terms.

The final ground taken by the appellants upon the question of registration is that there was no occasion to adduce evidence of the terms of the contract, as they had been admitted by the defendant. It is true that the defendant admitted that he had executed Ex. K, but he set up a further agreement, copy of which he filed as Ex. XXV, which would have had the effect of very substantially modifying the terms of Ex. K. It cannot be said therefore that the parties were *ad idem* as to the terms of the contract between them.

Since the inadmissibility of Ex. K is fatal to the plaintiff's claim, the question of the validity of the assignment of the debt to him by the V. S. R. S. Firm does not arise. The appeal is dismissed with costs.

Cornish, J.

Cornish, J.—I have come to the same conclusion, and will briefly state my reasons.

The plaintiff's evidence is that Ex. K was intended to embody the agreement between him and the defendant. He says:

"Even when the decision was effected on 11th Vykasi 1098 (corresponding to 24th May, 1923) it was decided that an agreement should be drawn up and executed in duplicate and each should keep one as a voucher to evidence the arrangements come to"

He adds that a draft of an agreement was prepared a few days later; the two fair copies were prepared from the draft, each being executed by plaintiff and defendant; and that Ex. K is the agreement executed by both and kept by the plaintiff. Further, Ex. K is in form an agreement, and does not purport to be a memorandum of an agreement previously made by the parties. It begins—"Agreement entered into on the 4th June, 1923, by both of us." In these circumstances it appears to me that Ex. K constitutes the contract between the parties; and

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consequently under section 91, Evidence Act, no other evidence of its terms can be given except the document itself: see *Subramonian* v. *Lutchman*.[1]

It is plain from a perusal of Ex. K, clauses (2), (5), (15) and (16) that immovable properties exceeding Rs. 100 in value were being assigned; and it would follow by reason of sections 17 and 49, Registration Act, that the document would require registration if that which was being assigned on the dissolution of the partnership was an interest in immovable property. I think it is clear upon the authorities that it was an interest in immovable property. The plaintiff and defendant as partners were joint owners of the partnership assets, movable and immovable: *see* section 253, Indian Contract Act. A partner, however, has no right to any specific items of the partnership property as representing his share. But he has, in respect of the amount which falls due to him when an account is taken upon a dissolution of partnership, a charge upon the immovable property of the *quondam* partnership (when the assets comprise such property) and this charge is an interest in land: see *Ashworth* v. *Munn*.[4] There it was held that a gift to charity by a testator, a partner in a mercantile firm, of the proceeds of the sale of his share in certain land held as partnership property, was a gift of an interest in land, and therefore void under the Mortmain Act. So, too, in *Gray* v. *Smith*[6] it was held by Kekewich, J., and the Court of Appeal expressed approval, that an agreement by one of the partners to retire from the partnership and to assign his interest in the partnership assets, which comprised land, was an agreement to assign an interest in land which required a memorandum in writing in pursuance of the Statute of Frauds. The ruling in *Venkataratnam* v. *Subba Rao*[3] is inconsistent with these authorities and I respectfully dissent from it. It appears that the learned Judges in the case reported in *Venkataratnam* v. *Subba Rao*[3] treated an ordinary partnership as standing on the same footing as a joint stock company with regard to the transfer of a partner's share; whereas as is shown by the judgments of the Court of Appeal in *Ashworth* v. *Munn*,[4] there is a great distinction between the two. Thus, at p. 372, Lord Justice Brett observed:

"There are joint stock companies where by the agreement of the partners, that is to say, by the constitution of the company to which they

1. (1922) L.R. 50 I.A. 77: I.L.R. 50 C. 338: 44 M.L.J. 602 (P.C.).
3. (1926) I.L.R. 49 M. 738: 51 M.L.J. 410
4. (1880) 15 Ch.D. 363.
6. (1889) 43 Ch.D. 208.

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have agreed, there are to be shares in the company, and there are to be shareholders, and by the agreed constitution of the company those shares may be transferred, and the company still continued. Now, in such a case if the company is the owner of land, in one sense, it may be said that that land does not belong to a corporation but does belong to the shareholder; but by the agreement of the parties that matter is to be dealt with precisely as if there was a corporation, that is to say, the shares are to be allowed to be transferred, so that the new shareholders may come into the partnership without the partnership ceasing at all. . . But when you come to the case of an ordinary partnership not so constituted, which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land which is the property of the partnership, in which, therefore, he has an interest."

In view of these authorities, the interest in the partnership assets which the parties to Ex. K purported to assign was, in my judgment, an interest in immovable property; and that being so, the document being unregistered is not receivable as evidence of any transaction affecting that property: see *James Skinner* v. *R. H. Skinner*.[2]

Nor can I discover in Ex. K an agreement to pay the money claimed by the plaintiff which is severable from the agreement transferring the immovable property. If there were two distinct provisions, the one relating to rights to the immovable property, and the other to the realization and payment of money, proof of the latter provision could be given without the document requiring registration: see *Vyravan Chetty* v. *Subramanian Chetty*[11] and the judgment of Sir John Wallis, C.J., in *Pothi Naickan* v. *Nagamma Naicker*.[12] In my opinion it is impossible to say that the part of the agreement upon which the plaintiff founds his claim to the Rs. 18,000 is independent of the agreement relating to the transfer of the immovable property. It is part and parcel of the same transaction and indivisible from it.

It has also been contended for the plaintiff that he is entitled to invoke the doctrine of part-performance in aid of his claim. In *Arseculeratne* v. *Perera*[15] it was held that this doctrine had no application to the stringent provisions of a Ceylon Ordinance which rendered "of no force or avail in law" any agreement as to land not duly attested by a notary and two witnesses. It seems to me that the doctrine must be equally unavailing against the not less stringent provision of section 49, Indian Registration Act. Reference, however, has been made to section 53-A of the

2 (1929) L.R. 56 I.A. 363: I.L.R. 51 A 771: 57 M.L.J. 765.(P.C).
11. (1920) L.R. 47 I.A. 188. I.L.R. 43 M. 660: 39 M.L.J. 37 (P.C).
12. (1915) 30 M.L.J. 62 (F.B). 15. (1928) A.C. 173.

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amended Transfer of Property Act. But the conditions which make that provision applicable have not been fulfilled in this case.

Upon these grounds, I think the plaintiff's suit failed and his appeal must be dismissed with costs.

S.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN AND SIR JOHN WALLIS.

G. H. C. Ariff .. *Appellant**

v.

Rai Jadunath Majumdar Bahadur .. *Respondent.*

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Ariff v. Rai Jadunath Majumdar Bahadur.

Transfer of Property Act (IV of 1882), S 107—Lease—Necessity for registered instrument—Verbal agreement for permanent lease—Defendant entering into possession and erecting buildings on the land—Suit for ejectment—Equitable estoppel—Right to enforce verbal agreement, time-barred, effect of—Part performance—English equitable doctrine, application of, so as to modify or override the statute.

In June, 1913, the defendant entered into possession of a plot of land under a verbal agreement by the plaintiff for the grant to him of a permanent lease, and thereafter he erected certain structures on the land at a cost of nearly Rs. 12,000. The plaintiff was aware of the construction and, as the Courts in India found, he must have realised that the defendant would not have constructed the building unless he was assured of the possession of a permanent right in it. The defendant in December, 1918, had notice that performance of the verbal agreement of 1913 was definitely refused by the plaintiff. In April, 1923, the plaintiff after duly serving a notice to quit, sued to eject the defendant upon the allegation that he was merely a monthly tenant.

Held, (1) that in view of the provisions of S. 107 of the Transfer of Property Act, 1882, in the absence of a lease in the form of a registered instrument, the verbal agreement alone could not create a permanent lease in favour of the defendant,

(2) that on the facts of this case, there was no equitable estoppel against the plaintiff, the structures having been erected by the defendant "not by reason of any encouragement or abstention on the part of the plaintiff, but by reason of the agreement which he was then entitled to enforce against the plaintiff,"

(3) that the defendant could not rely upon the English equitable doctrine of part performance. In order that a Court of Equity may enforce a title to land against the legal owner thereof on the ground of part-performance, the title must be based upon contract express or implied or upon estoppel. Here there was no estoppel, no implied contract. The acts of the defendant were referable solely to the verbal contract. He had a right to enforce the contract when he incurred the expenditure but he allowed it to become barred (Art 113, Limitation Act) so that he cannot resist the appellant's claim to possession by referring to a title the acquisition of which is forbidden by statute, and

*P.C. Appeal No. 116 of 1929 23rd January, 1931.
Bengal Appeal No. 18 of 1929.

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(4) that, under the circumstances, the plaintiff, being the legal owner of the land, was entitled to obtain a decree for possession, as prayed, the defendant being at liberty to remove the structures erected thereon

Obiter: If the defendant's right to enforce specific performance of the oral agreement had been *subsisting* at the date of the institution of the plaintiff's suit for ejectment, the defendant could have claimed to have executed and registered in his favour by the plaintiff an instrument in writing, the plaintiff's suit being stayed in the meantime, and that would have been consistent with the requirements of the statute.

Generally speaking, the English equitable doctrine of part performance cannot be applied by analogy so as to modify or override the mandatory provisions of an Indian statute, such as the Transfer of Property Act, and thus, in effect, to nullify the statutory requirement of a registered instrument.

Mahomed Musa v. *Aghore Kumar Ganguli,* (1914) L.R. 42 I.A. 1: I.L.R. 42 C 801: 28 M.L.J. 548 (P.C.) and *Malraju Lakshmi Venkayyamma* v *Venkata Narasimha Appa Rao,* (1916) L.R. 43 I.A. 138: I.L.R. 39 M 509: 31 M.L.J. 58 (P.C.), distinguished.

Maddison v *Alderson,* (1883) 8 A.C. 467; *Walsh* v *Lonsdale,* (1882) 21 Ch.D. 9; *Gregory* v. *Mighell,* (1811) 18 Ves. 328; *Ramsden* v. *Dyson,* (1866) L.R. 1 H.L. 129 and *Britain* v. *Rossiter,* (1879) 11 Q.B.D. 123, referred to and discussed.

Judgment of the High Court, Calcutta, in *G. H. C Ariff* v *Jadu Nath Majumdar,* (1928) I.L.R. 55 Cal. 1090, reversed

Appeal No. 116 of 1929, by special leave, from a decree of the High Court, Calcutta, dated the 18th January, 1928, which affirmed a decree of the District Judge of the 24 Parganas, dated the 10th July, 1925, which in its turn had affirmed a decree of the Munsif of Sealdah, dated the 28th June, 1924.

The facts of the case are fully set out in the judgment of the High Court, Calcutta, reported in *G. H. C. Ariff* v. *Jadu Nath Majumdar*[1] and also in that of the Judicial Committee. The main question on the present appeal was whether the respondent (defendant) was, by reason of the equitable doctrine of part-performance, a permanent tenant of the plaintiff, although a registered lease had not been executed in his favour, as required by S. 107 of the Transfer of Property Act, 1882.

Dunne, K.C. (with *Dube*) for appellant.—The defendant could get equitable relief only if his right to specific performance was subsisting: *Shyam Kishore Dey* v. *Umesh Chandra Bhuttacharjee*[2] and *Gajendra Nath Dey* v. *Moulvi Ashraf Hossain.*[3] The finding of the District Judge was that the right was barred, as the refusal to perform the terms of the oral contract was more than three years prior to the suit: Art. 113, Limitation Act. The question of part performance is open so far as the decisions of the Board are concerned.

1. (1928) I.L.R. 55 C. 1090.
2. (1919) 24 C.W.N. 463.
3. (1922) 27 C.W.N. 159.

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Refers to Transfer of Property Act, S. 54 (sale), last paragraph.

LORD BUCKMASTER in *Maung Shwe Goh* v. *Maung Inn*[4] said that this swept away all English equitable rights.

[SIR JOHN WALLIS.—All the main sections of the Act were drafted by Lord Justice James himself.]

[LORD ATKIN.—The definition of a lease in the Transfer of Property Act is quite different from the English conception of a lease.]

Refers to sections 105, 106 and 107. A lease is a transfer of a right to enjoy property and it cannot be effected except by a registered instrument. Registration Act, S. 17 referred to. When a document in itself creates a lease, it requires registration.

In *Mahomed Musa* v. *Aghore Kumar Ganguli*[5] it was a transfer of 1873 at a time when you did not require a registered document. It was a judgment in a case before the Transfer of Property Act. Here, there was an *oral* lease, and so the Registration Act would not apply, but only the Transfer of Property Act.

[LORD ATKIN refers to the Specific Relief Act, 1877, on the question of specific performance, and to S. 4 (*c*).]

[LORD RUSSELL.—Is there in India any corresponding provision to our English Statute of Frauds? There is nothing to prevent you from getting specific performance of an oral contract, so there is really nothing corresponding to our Statute of Frauds in India.]

Mahomed Musa v. *Aghore Kumar Ganguli*[5] distinguished.

Refers to the Calcutta view, as enunciated in *Kalipada Basu* v. *Fort Gloster Jute Manufacturing Co.*[6]

[LORD ATKIN observed that in *Mahomed Musa* v. *Aghore Kumar Ganguli*,[5] Lord Shaw laid great stress on the actings of the parties.]

Distinguishes also *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao.*[7]

[LORD RUSSELL.—The finding was, that there was a concluded contract.]

We submit that neither *Mahomed Musa* v. *Aghore Kumar Ganguli*[5] nor *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao*[7] touches the point in issue here.

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4. (1916) L.R. 44 I.A. 15: I.L.R. 44 C. 542: 32 M.L.J. 6 (P.C.).
5. (1914) L.R. 42 I.A. 1: I.L.R. 42 C 801: 28 M.L.J. 548 (P.C.).
6. (1926) 31 C.W.N. 348.
7. (1916) L.R. 43 I.A. 138: I.L.R. 39 M. 509: 31 M.L.J. 58 (P.C.).

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[LORD RUSSELL observed that *Mahomed Musa* v. *Aghore Kumar Ganguli*[3] would have been relevant if the transaction there had taken place after the passing of the Transfer of Property Act.]

Cites and distinguishes the recent decision of the Board in *Forbes* v. *Ralli*.[8]

[LORD ATKIN.—The decision proceeded on the question of estoppel. It has no bearing on the present case.]

Vizagapatam Sugar Development Co. v. *Muthuramareddi*[9] is the leading case for the view that the doctrine of part performance applies, although defendant is too late to claim specific performance. The point decided by the Division Bench was not dealt with by the Full Bench.

[SIR JOHN WALLIS.—They held that part performance took the case out of the statute.]

The Full Bench overruled *Kurri Veerareddi* v. *Kurri Bapireddi*.[10]

[SIR JOHN WALLIS referred to the head-note in *Kurri Veerareddi* v. *Kurri Bapireddi*[10] and observed that it was the strongest case in support of the appellant's contention before the Board.]

[SIR JOHN WALLIS referred to *Bapu Apaji* v. *Kashinath Sadoba*.[11]]

[LORD ATKIN.—A person who relies on an equitable right must show that he has that right subsisting when he asserts it.]

The Calcutta Courts have consistently taken the view that the right to obtain specific performance must be subsisting to entitle the defendant to the benefit of the equitable doctrine of part performance: *Shyam Kishore Dey* v. *Umesh Chandra Bhuttacharjee*[2] and *Kalipada Basu* v. *Fort Gloster Jute Manufacturing Co.*[6] (where all the cases are discussed).

We submit that the findings necessary to constitute a case of equitable estoppel have not been made out against the appellant. The matter being governed by the Transfer of Property Act, S. 107, the defendant is not a permanent tenant, but only a tenant-at-will.

2. (1919) 24 C.W.N. 463
5. (1914) L.R. 42 I.A 1: I.L.R 42 C. 801 28 M.L.J. 548 (P.C.).
6 (1926) 31 C.W.N. 348
8. (1925) L.R. 52 I.A. 178: I.L R. 4 Pat 707: 49 M.L.J 48 (P C)
9 (1923) I.L.R. 46 M 919: 45 M.L.J. 528 (F.B.)
10 (1906) I L.R 29 M 336 16 M.L.J. 395 (F.B.)
11. (1916) I.L.R. 41 B. 438.

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Wallach for respondent.—On the facts as found, the plaintiff's claim is barred by the principles of waiver, estoppel and acquiescence. The doctrine of part performance applies, although our right to specific performance may have been statute-barred: *Shafikul Huq Chowdhry* v. *Krishna Gobinda Dutt*[11] and *Visagapatam Sugar Development Co.* v. *Muthuramareddi.*[9]

On the question of the removal of the structures erected by the respondent, reference was made to *Vallabhdas Naranji* v. *Development Officer, Bandra*[13] and *Narayan Das Khettry* v. *Jatindra Nath.*[14]

The other authorities cited at the Bar during the argument are referred to in their Lordships' judgment and also in the High Court judgment in *G. H. C. Ariff* v. *Jadu Nath Majumdar.*[1]

23rd January, 1931. Their Lordships' judgment was delivered by

Lord Russell.

LORD RUSSELL OF KILLOWEN.—By this suit the appellant sought to recover possession of a parcel of land from the respondent upon an allegation that the respondent was a monthly tenant-at-will thereof, whose tenancy had been effectively determined before suit.

The action was tried in the Court of the Munsif of Sealdah. He found, in favour of the appellant, that a notice to quit had been duly served; but he also found, in favour of the respondent upon other issues, that the respondent was a permanent tenant, and dismissed the suit. An appeal to the District Judge was dismissed.

The relevant facts as found in both these Courts may be shortly stated.

In 1913 a verbal agreement was made between the appellant and respondent, for the grant to the respondent by the appellant of a permanent lease of a small parcel of land at a total rent of Rs. 80 per month. In anticipation of the execution of the lease, the respondent was let into possession in June, 1913, and shortly thereafter he erected certain structures on the land with the knowledge and approval of the appellant. At some time in the

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1. (1928) I.L.R. 55 C 1090.
9. (1923) I.L.R. 46 M. 919· 45 M.L.J. 528 (F.B).
12. (1918) 23 C.W.N. 284.
13 (1929) L.R. 56 I.A. 259. I.L.R. 53 B. 589. 57 M.L.J. 139 (P.C).
14. (1927) L.R. 54 I.A. 218: I.L.R. 54 C 669: 53 M.L.J. 158 (P.C).

course of the year 1914 the parties seem to have agreed that the lease should be a lease for five years, renewable at the end of every period of five years. No lease was ever executed; but in October, 1922, the appellant served upon the respondent a notice to quit, asserting that he was a monthly tenant, and requiring the premises to be vacated by the 1st November, 1922. This not being done, the suit was instituted in the month of April, 1923.

An appeal was preferred to the High Court of Judicature at Fort William in Bengal, which remitted the case to the District Judge in order to obtain findings of fact on two points, viz.: (1) when the respondent had notice that performance of the verbal agreement of 1913 was refused by the appellant, and (2) whether the structures which the respondent erected on the land shortly after 1913, involved such an outlay of money as would reasonably strike the appellant as being an assertion of a permanent right in the land on the part of the respondent, or as would reasonably call for objection from a landlord who never intended to grant a permanent lease.

The District Judge duly returned his findings to the High Court, and found (1) that the respondent had in December, 1918, a definite refusal in clear terms on the part of the appellant, to perform the terms of the verbal agreement of 1913, that the present suit was not instituted within three years of that notice, and that the respondent's claim for specific performance was barred in view of Art. 113 of Schedule I of the Limitation Act, and (2) that the respondent erected on the land a godown at a cost of between Rs. 10,000 and Rs. 12,000, that the appellant was aware that this building had been constructed, that he must have realised that the respondent would not have constructed the building on the land unless he was assured of the possession of a permanent right in it, and that if the appellant had not intended to grant a permanent lease of the land it might reasonably be expected that he would have objected to the construction of such a building.

The High Court then proceeded with the hearing of the appeal, and on the 18th January, 1928, made an order dismissing it with costs.

Before considering the grounds upon which the various Courts have refused relief to the appellant, it appears advisable to call attention to the fact that the appellant is the legal owner of the land; and as such he is entitled to possession thereof subject only to such right (if any) to enjoy it as may have been

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conferred upon the respondent by virtue of the verbal agreement, either alone or in conjunction with the other facts in the case.

Now it is clear that the verbal agreement alone could confer upon the respondent no such right. By section 107 of the Transfer of Property Act, 1882, it is expressly enacted that "a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument. All other leases of immovable property may be made either by an instrument or by oral agreement." This amounts to a statutory prohibition of the creation of such a right as is claimed here by the respondent, otherwise than by a registered instrument. No registered instrument exists, therefore, the respondent can have no such right as he claims unless he can establish it by some means operating independently and in violation of the statute.

The Courts in India held that he had established the right to enjoy the property as a permanent tenant upon grounds which their Lordships now proceed to examine.

The Munsif held that, by means of the equitable doctrine of part performance, the case was taken out of the provisions of the Transfer of Property Act, even if the respondent's right to sue for specific performance was barred. He held, however, that the respondent's right to sue was not barred and that his rights and liabilities were the same as they would have been if a lease had in fact been executed and registered. That, as their Lordships understand it, is the basis of his judgment; but he added a general statement, without entering into detail, that the appellant's claim was "barred by principles of waiver, estoppel and acquiescence."

The District Judge stated the question for decision as being, whether the equitable doctrine of part performance could override the provisions of the statutory law. He held that various decisions of the Courts in India had established that where there was a concluded agreement followed by part performance, the English equitable doctrine of part performance would apply even if the requirements of the Transfer of Property Act had not been fulfilled, and even if the right to sue for specific performance of the contract had become barred.

In the High Court the principal judgment was delivered by Mukerji, J. The other learned Judge (Graham, J.) agreed that the appeal failed, although the result would be the creation of a permanent lease without any registered instrument.

Mukerji, J., in his judgment, starts with the proposition that the respondent, not having obtained a lease in the form of a registered instrument, could only resist ejectment if the case fell within some principle of equity.

He held that the case (being one in which an oral agreement and possession on the footing of it had been established) fell within what he calls the principle of *Maddison* v. *Alderson*[15] by virtue of which "it must be held that the defendant is holding under a permanent lease which the plaintiff agreed to grant him and which equity will regard as having been so granted." He apparently realised that it might well be doubted, whether such a doctrine could be applied or could operate in cases where statute law required the existence of a registered document as an essential for the creation of the title which the respondent claimed. In his opinion, however, the language used by this Board in two cases to which reference will be made hereafter, was wide enough to remove any such doubt. He held that, while the respondent had no valid title as lessee in the absence of a registered instrument, and had only such title as possession might confer, yet the appellant could not displace that possessory title by reason of the equities arising out of the executed contract.

The learned Judge then discussed "the doctrine enunciated in the cases of which *Walsh* v. *Longsdale*[16] is the type." This, he held, had no application to the present case, because the respondent's right to sue upon the verbal contract was barred.

Finally, he held that the case also fell well within what he called "the doctrine of equitable estoppel laid down in *Gregory* v. *Mighell*,[17] as explained in the case of *Ramsden* v. *Dyson*[18]." He quotes verbatim the two principles stated by Lord Kingsdown in *Ramsden* v. *Dyson*[18] and says that "the findings of the Court below, such as they are now, clearly bring the case within the first of the aforesaid two principles." The reference to the findings "as they are now" would seem to include particularly the detailed finding as to the character of the structures erected on the land.

Their Lordships cannot help feeling that some confusion of thought has prevailed in the Courts below in regard to the facts of this case, and the application of the authorities to those facts.

15 (1883) 8 A.C. 467.
16 (1882) 21 Ch D. 9.
17. (1811) 18 Ves. 328.
18. (1866) L.R. 1 H.L. 129.

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This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent. Observe the true facts. In 1913 the respondent obtained a verbal agreement for the grant of a perpetual lease, under which agreement he could have sued for and obtained and registered an instrument creating his title to enjoy the property in perpetuity. That agreement continued to be enforceable against the appellant until the month of December, 1921. The structures were erected on the land many years before that date, and they were erected not in any mistaken belief by the respondent of his rights in regard to the land, but in assertion of rights which he correctly believed to be his; not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

In these circumstances, how can "the case of *Maddison* v. *Alderson*[15]" assist the respondent? That case decided no new principle. It decided nothing except that upon the facts there proved, there was no part performance of a verbal contract sufficient to take the case out of section 4 of the Statute of Frauds. It is only one of many cases which deals with the English equitable doctrine by which part performance of verbal contracts concerning land, will dispense with the necessity of producing the memorandum of the terms of the contract signed by the party to be charged, which is required by section 4 of the Statute of Frauds.

It is well settled that the Statute of Frauds only affects the right to sue on the contract. The contract subsists notwithstanding the absence of any signed memorandum. The Courts of equity in England, however, have decided that once the making of the contract has been established by the part performance of it, one of the parties to it shall not be permitted to use the Statute of Frauds as an instrument of fraud. These decisions have been described as "bold decisions on the words of the statute," and the doctrine as of a nature "not to be unwarrantably extended" (see *Britain* v. *Rossiter*[19]).

The basis of the doctrine of part performance has been stated in various ways. Cotton, L.J., in *Britain* v. *Rossiter*,[19] states it thus:

15. (1883) 8 A.C. 467.

19. (1879) 11 Q.B.D. 123 at 129 and 133.

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"The true ground . . . is that if the Court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable at law to an action of trespass, the Court would hold that there was strong evidence that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken."

Any relief granted or protection afforded to the person in possession will be founded on the contract; but the fact of part performance renders unnecessary the protection provided by the statute, in its requirement of a memorandum of the terms signed by the party to be charged. It was stated in *Maddison* v. *Alderson*[15] that the equitable doctrine of part performance did not rest upon the view that equity will relieve against a public statute in cases which fall within it; but, as Lord Selborne expressed it, the Statute of Frauds only contemplates the case of a person being charged upon the contract only; it has not in view the case of a person being charged upon the contract, coupled with acts done in pursuance of the contract.

Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible. Whether any such authority exists will be considered later.

Their Lordships find themselves in agreement with the High Court in the view that *Walsh* v. *Lonsdale*[16] has no application to this case, owing to the fact that the respondent's right to enforce the verbal contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but

15 (1883) 8 A.C. 467

16. (1882) 21 Ch D 9.

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consistently with and not in violation of the provisions of the Indian statute.

There remains for consideration the other ground upon which the High Court based its decision, viz., that the case fell within the doctrine of equitable estoppel laid down in *Gregory* v. *Mighell*,[17] as explained in the first principle stated by Lord Kingsdown in *Ramsden* v. *Dyson*.[18] It appears to their Lordships that in this regard there has been some misapprehension. The relevant language of Lord Kingsdown is as follows:—

"If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation This was the principle of the decision in *Gregory* v *Mighell*[17], and, as I conceive it, is open to no doubt"

It will be noticed that Lord Kingsdown is dealing with the case of express verbal contract or something "which amounts to the same thing." He nowhere puts the case of estoppel; the word is not mentioned. He would appear to be dealing simply with the equitable doctrine of part performance. His reference to *Gregory* v. *Mighell*[17] confirms this view, for that case was simply an earlier instance of the application of the doctrine. In that case a bill for specific performance of a verbal agreement for the grant of a lease had been filed by a person in possession of the land. The Statute of Frauds was pleaded; but it was held that the possession being referable to the verbal agreement, there was part performance, and the Statute of Frauds affording in the circumstances no defence, specific performance was decreed. That is the whole decision in *Gregory* v. *Mighell*.[17]

Reference is made by the learned Judge to the case of *Forbes* v. *Ralli*[8] before this Board, but that decision was based upon an estoppel grounded upon a statement of fact. It was a case in which the plaintiff in ejectment was held estopped under section 115 of the Indian Evidence Act, 1872, from denying that a certain registered written agreement was an agreement for a permanent tenancy It is obviously no authority to assist the respondent here.

Even if Lord Kingsdown's language was intended to cover something beyond the equitable doctrine of part performance in

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8. (1925) L.R. 52 I.A. 178: I.L.R. 4 Pat. 707: 49 M.L.J. 48 (P.C.).
17. (1811) 18 Ves. 328
18 (1866) L.R. 1 H.L. 129.

relation to the Statute of Frauds, and was intended to refer to circumstances in which a Court of Equity will enforce a title to land against the person who at law is the owner thereof, the title must, nevertheless, in their Lordships' view, be based either upon contract express or implied, or upon some statement of fact grounding an estoppel.

Their Lordships have already indicated their opinion that no act was done by the respondent otherwise than under the verbal contract which was then enforceable at his suit. No circumstances exist from which any other contract by the appellant can be implied; and as to estoppel there is no trace of any statement by him upon which any estoppel can be grounded.

In truth this case, when the true facts are appreciated, is simple enough. The acts of the respondent are all referable to a verbal contract, which was enforceable against the appellant at the time when the respondent's expenditure was incurred, and for long afterwards. Unfortunately for the respondent, he allowed his right to enforce his contract to become barred, with the result that he can only resist the appellant's claim to possession by seeking to establish a title, the acquisition of which is forbidden by the statute. The statute disables him from contesting the appellant's right to possession.

Their Lordships think it unnecessary to discuss the numerous decisions of Courts in India which are referred to in the judgments and which were much discussed before the Board. They indicate conflicting views upon the questions which arise for decision here for the first time. It will, their Lordships think, be sufficient to consider the two cases before this Board in which, according to the High Court, language was used indicating that the respondent in the present case should be treated as a person having the rights which he would have enjoyed if the promised lease had been executed and registered. The cases referred to are *Mahomed Musa* v. *Aghore Kumar Ganguli*[5] and *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao*.[7]

Neither of these cases, as a decision, affects the case now under consideration by the Board. The matter which was relied upon by the respondent consisted of certain *obiter dicta* in the course of which English doctrines of equity were described in terms of the law of Scotland and stated to be applicable in India.

5. (1914) L.R. 42 I.A. 1: I.L.R. 42 C. 801: 28 M.L.J. 548 (P.C.).
7. (1916) L.R 43 I.A. 138: I.L.R. 39 M. 509: 31 M.L.J. 58 (P.C.).

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In the former case the appeal was dismissed upon the grounds that a contract to convey had been made and that at the relevant date no written conveyance was required, the Transfer of Property Act, 1882, not having been passed.

In the latter case the decision rested entirely on the fact that a valid contract had been made and was enforceable by the appellant.

In each case, however, the judgment contains statements to the effect that even if the contract in question had been incomplete, the acts of the parties had been such that equity would in some way have bound the parties. Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient in some requirement as to form, is nevertheless an existing contract. Equity does this, as before stated, in the case of a verbal contract for the sale of land which has been partly performed. Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed, where no contract was in fact made; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.

In their Lordships' opinion, the doubt entertained by Mukerji, J., whether the equitable doctrine which he thought was applicable, could operate so as to nullify the statutory requirement of a registered instrument, was justified.

Their Lordships cannot find that the facts of this case raise any equity in favour of the respondent. Even if any such equity was established, their Lordships are of opinion that it could not operate to nullify the provisions of the Indian Code relating to property and transfers of property.

For the reasons above given their Lordships are of opinion that this appeal should succeed. The decrees in the Courts below should be set aside and an order made for possession of the land in question. The case must be remitted to the Munsif to deal with the eighth issue on the footing of this judgment. The appellant does not claim that the structures should remain on the land; the respondent must accordingly be at liberty to apply to the Court below either to fix a time within which he may enter and remove the structures, or to suspend the operation of the order for a sufficient time to enable him to effect such removal. The respondent must pay the appellant's costs in the

Courts below and of this appeal. Their Lordships will humbly advise His Majesty accordingly.

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Solicitors for appellant: *Watkins and Hunter.*

Solicitor for respondent: *H. S. L. Polak.*

K.J.R.|S.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Corporation of Madras .. *Appellant* in both appeals (Plaintiff in O.S. Nos. 546 and 527 of 1923)*

v.

The Madras Electric Tramways and The Madras Electric Supply Corporation, Ltd. .. *Respondents.*

Corporation of Madras
v.
The Madras Electric Tramways, Ltd.

Madras City Municipal Act (IV of 1919), Ss. 287 and 288—License—Necessity for—Workshop of the Madras Tramways Company—Tramways Act (XI of 1886), S. 7 (2) (i)—"Other works"—Madras Electric Supply Corporation—Steamboiler in the generating station—Control of Commissioner—Interpretation of Statutes—General and special Acts—Rule of interpretation—Statutory body of public utility—Immunity from general law—Electricity Act (IX of 1910)—Scope of—S. 37 (2) (f)—Rule-making power—Effect of—Powers of Commissioner of Corporation—Object of

Neither the Tramways Act nor the order issued by the Government under that Act exempts the Tramway Company from the obligation to take out a license under S. 287 of the Madras City Municipal Act for casting and beating metal or breaking iron in their workshops.

Workshops are not included in the words "other works" in S. 7 (2) (i) of the Tramways Act.

The license issued to the Madras Electric Supply Corporation by the Local Government under the Electricity Act for the supply of electricity in Madras does not exempt the Company from the necessity of obtaining permission under S. 288 of the Madras City Municipal Act for erecting a steam-boiler in their generating station A special Act can override a general Act only in case the one conflicts with the other Assuming in favour of the Electric Corporation that a license for the supply of electrical energy could include by implication a license for establishing a generating station and assuming further that a licensee under a general Act like the Electricity Act stands in the position of a person in whose favour a special Act has been made, there is no inconsistency here between the terms of the license and the provisions of the Municipal Act. All that the license says is that the generating station should be within the area of supply and that by itself does not conflict with the imposition of local control over the generating station.

Metropolitan Asylum District v. *Hill*, (1881) 6 A.C. 193, relied on.

Municipal Commissioner of Bombay v. *G.I.P. Ry. Co.*, (1909) I.L.R. 34 Bom. 252, distinguished.

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*L.P. As. Nos. 265 and 264 of 1927. 4th September, 1930.

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The fact that the Corporation had an opportunity, at the time of the issue of license by the Local Government, to object to the issue and that they did not do so does not in any way affect their control under S 288.

Nor is the circumstance that the Company is a statutory body of public utility with compulsory obligations to the public enforceable by penalties and working under a private Act of its own conclusive on the question of their exemption from the Municipal Act Where there is no inconsistency between the general and the special Acts, the company can properly be subject to the provisions of both the Acts, to the control of two or more authorities who have different interests to protect. English cases referred to.

The Electricity Act is not a complete Code. It is directed to the supply and use of electricity and not primarily to generation There is nothing in the Act to suggest it was intended to exclude the operation of any other Act and the power of the Governor-General in Council to make rules under S 37 (2) (*f*) for the protection of persons and property from defective machinery cannot exclude the control of the local authority.

The powers of the Commissioner under Ss 287 and 288 of the Madras City Municipal Act are intended—not for the prohibition—but for the regulation of the trades and operations mentioned in the Schedule in public interests. If he acts arbitrarily, there are appropriate remedies, but in any case, the possibility of his abusing his powers is no reason for questioning his powers under the Act.

Referring to the doctrine of *Generalia specialibus non derogant,* Reilly, J., observed as follows:—

"If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the legislature has had the special Act in its mind and had intended to abrogate it, the provisions of the general Act do not override the special Act If the special Act is made after the general Act, the position is even simpler. Having made the general Act, if the legislature afterwards makes a special Act in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act as an exception to the general Act."

Case-law referred to.

Appeals preferred under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Waller, dated 10th December, 1926, in C.C.C. Appeals Nos. 8 and 9 of 1925 respectively on the file of the High Court (O.S. Nos. 546 and 527 of 1923 respectively on the file of the City Civil Court, Madras).

The judgment of Waller, J., is reported in *The Corporation of Madras* v. *The Madras Electric Tramways, Ltd.*, (1926) 52 M.L.J. 474.

T. M. Krishnaswami Aiyar for appellant.

Sir C. P. Ramaswami Aiyar instructed by *Messrs. Short, Bewes & Co.* and *Messrs. Moresby and Thomas* for respondents.

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The Court delivered the following

JUDGMENTS. *Reilly, J.*—These two appeals relate to suits in which the Corporation of Madras claimed declarations that the Madras Electric Tramways Company and the Madras Electric Supply Corporation respectively were subject to the control of the Commissioner of the Corporation under Ss. 287 and 288 respectively of the Madras City Municipal Act. The suits were tried by the Judge of the City Civil Court, who dismissed both of them. They came on appeal before Waller, J., whose opinion was that both the Companies carried on their operations under special Acts, or what were equivalent to special Acts, inconsistent with the general Act, the City Municipal Act, and that the Corporation of Madras were not entitled to the declarations for which they sought. He upheld the decision of the City Civil Court; and it is against that decision that these two appeals have been preferred.

I think it will be convenient to deal with the two cases separately, and, if I may say so with great respect, I doubt whether Waller, J., would have arrived at his decision in respect of the Tramways Company, if he had treated it separately from the case of the Electric Supply Corporation. The Tramways Company operates under what is called an order issued by the Government under the Tramways Act. In the course of their operations they maintain a workshop, we are told, in which they cast metals, break and hammer iron and beat metals. Under S. 287 of the City Municipal Act no one is permitted in the City of Madras to use any place for those operations without obtaining a license from the Commissioner of the Corporation. The Tramways Company contend that by virtue of the order issued to them by the Government under the Tramways Act they are not subject to the provisions of S. 287 of the City Municipal Act. It was suggested at one stage of the argument by Sir Ramaswami Aiyar, who appears for the Tramways Company, that it would be an impossible position if the Tramways Company were required to take out a license from the Commissioner of the Corporation for every place in which they might want to repair the lines of their tramways in the public streets by hammering or beating metal. But Mr. Krishnaswami Aiyar, who appears for the Corporation of Madras, has explained that the suit is confined to the workshops of the Tramways Company, and I shall deal with it in that sense.

If we examine the Tramways Act, we find that workshops are nowhere mentioned in it, except in one place, to which I shall refer in a minute. In the order issued by the Local Gov-

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ernment to the Tramways Company, which purports to be made under the Tramways Act, there is a mention of workshops. In clause (6) of the order the Company is empowered to establish workshops; but in that respect the order appears to go beyond the Act, and the mention of workshops in it is of no effect. Sir Ramaswami Aiyar drew our attention to S. 7 (2) (*i*) of the Act under which such an order may provide for

"the provision of such crossings, passing places, sidings, junctions and other works, . . . as may from time to time be necessary or convenient to the efficient working of the tramway,"

and he suggested that "other works" in that clause would include workshops. If I may say so, that argument appeared to be one of last resort, because it is clear that in that connection we cannot construe "other works" as including workshops without offending against a well-established canon of interpretation. I have mentioned that in one place in the Act there is a reference to workshops. In S. 44 it is provided that the Local Government may exempt yards and workshops of the tramway undertaking from local taxation. But the power to exempt the Tramways Company from taxation under that section does not bring workshops within the scope of the Act otherwise.

It is clear I think that the Act is not concerned with workshops. It provides for the granting of the privilege of laying tramway lines along public streets, running tram-cars along them and various other matters, but not for the construction of workshops. Still less could it be supposed to provide for the conduct and management of workshops or operations which might be carried on in them. There is nothing to suggest that in the Act. And it is clear that it is not really essential for a tramway undertaking that those who undertake it should have their own workshops. It is quite conceivable that they should arrange to get their tram-cars and other apparatus repaired, when necessary, either in the workshops of another company or by outside engineering firms or contractors. But no doubt for such a tramway undertaking as that of the Tramways Company in Madras it is convenient and economical, and I should say prudent, to have their own workshops; but for that they require no authorisation under the Tramways Act. They are quite as much at liberty as anybody else to establish workshops for that purpose. But, if they are as much at liberty as other inhabitants of Madras to establish workshops, why should they have greater liberty than other inhabitants in the matter? Why should they be at liberty to set up, as is suggested on their behalf, workshops wherever they like in the City of Madras and to carry on opera-

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tions, however offensive to their neighbours, when other people are restrained by the provisions of the City Municipal Act from doing so? If the Tramways Company were free from all control in the matter, they might set up workshops and make the most intolerable din immediately next to a place of worship or a school or a law Court. Why should they have that extraordinary liberty? On the face of it, it is both unnecessary for their purposes and very undesirable in the public interest that they should have such liberty.

Sir Ramaswami Aiyar suggested that there was some indication in the Act that the Tramways Company may be in a privileged position. He pointed out that under S. 35 of the Act disputes between the Company and the Corporation on certain matters are to be settled by a referee. But that does not affect the question of workshops, unless workshops come within the scope of the Act. It was also suggested that, if the Tramways Company's workshops are under the control of the Commissioner, the Commissioner might exercise that control so as to prohibit the Tramways Company from using their workshops at all and so throw their whole undertaking out of order. That does not appear to me to be at all an effective argument. The Commissioner has powers under S. 287 of the City Municipal Act over persons who conduct a number of different trades, occupations and operations. But, if we examine that section and Sch. VI, which has to be read with it, I think it is clear that the powers entrusted to the Commissioner are not intended for the prohibition of any of these trades, occupations or operations, but for their regulation in the interests of the people of Madras. If we look at Sch. VI, we find that among operations which cannot be carried on without obtaining a license under the section from the Commissioner of the Corporation are boiling paddy, washing clothes, baking bread and making soda water. Can it be supposed that it was intended that the Commissioner of the Corporation under the City Municipal Act should have power arbitrarily to prohibit any of these operations from being conducted in any part of the City of Madras? Such a suggestion on the face of it would be absurd. It is possible that, if the Commissioner found that a very large number of persons were applying for licenses to carry on one of the more objectionable trades or occupations included in that schedule, he might reasonably say: "there are quite enough people in Madras doing that business already, and, if I allow any more to do so, there will be serious nuisance to the public." In such a case he might perhaps use his powers of refusing licenses to prohibit any more people

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starting those particular operations. But, apart from that, I think it is quite clear that the Commissioner's powers are intended for regulation, not for prohibition. And it has to be noticed that, if he refuses to grant a license under S. 287, he has to state his reasons for doing so: he cannot act arbitrarily. And any person who applies for a license which is refused by the Commissioner, or to which the Commissioner attaches conditions, can appeal to the Standing Committee of the Corporation. It is suggested that possibly the Standing Committee might use its powers in conjunction with the Commissioner unreasonably, perversely or for ulterior objects and so prohibit some one, the Tramways Company for instance, from having a workshop anywhere in Madras. If the Standing Committee by any chance used their powers unreasonably, perversely or for ulterior objects in that way, the person concerned would not be without his remedy in the Courts. I think we need not pursue such speculation further in this matter.

Workshops, as I have said, are not provided for in the Tramways Act. They are provided for in the City Municipal Act. There is nothing in the least inconsistent between the provisions of the Tramways Act and the provisions of the City Municipal Act whereby the Commissioner is empowered to require any one to take out a license before he casts metal, or hammers or breaks iron, or beats metal—the processes with which we are concerned. In my opinion, the appeal in the Tramways Company's case should be allowed with costs throughout, and a declaration should be made that the Tramways Company are not entitled to cast metal or to break or hammer iron or to beat metal in their workshops without obtaining licenses from the Commissioner of the Corporation under S. 287 of the City Municipal Act.

The case of the Electric Supply Corporation is not quite so simple. In that case the Corporation of Madras prayed for a declaration that the Electric Supply Corporation, which I shall refer to as the Electric Company, must obtain permission under S. 288 of the Madras City Municipal Act for erecting a steam-boiler in their generating station in Madras. The predecessors of the Electric Company obtained in 1905 a license from the Local Government under the Electricity Act for the supply of electricity throughout the Municipal limits of Madras subject to certain minor exceptions. The license was primarily

for the supply of electrical energy to consumers. But in the license there is a statement—"The generating station is to be within the area of supply." The contention for the Electric Company is that their license in respect of that generating station places them outside the scope of the City Municipal Act so far as their buildings, machinery and other apparatus are concerned and that the Commissioner has no right to assert that they must obtain permission from him before they can have a steam-boiler in that station.

There was a good deal of argument before us on the question whether under the Electricity Act a license for the supply of electrical energy could include a license for establishing a generating station. The Act is not at all clear upon that point; but for the purpose of this case I am prepared to assume that the Local Government, when they issued a license to the Electric Company for the supply of electrical energy within the City of Madras, also issued to them a license under the Act to establish a generating station. As I have said, the Electric Company contend that over that generating station the Commissioner of the Corporation has no authority whatever. A large part of the case was argued before us on the assumption that a license issued to a person for the supply of electrical energy under the Electricity Act puts him in the same position as if a special private Act had been made in his favour. I think it would not be difficult to show that a licensee under an Act of a general character like the Electricity Act, which extends to the whole of British India, is not in all respects in the same position as a person in whose favour a special Act has been made. But for the purpose of this case I am prepared to assume that the Electric Company by their license were put into the same position as if a special Act has been made in their favour.

A good deal of time was occupied in the arguments by a discussion of the question how special Acts and general Acts, if they come into conflict, are to be treated. A great deal of that discussion, if I may say so, appeared to me unnecessary. There is the old maxim *Generalia specialibus non derogant;* that is, general provisions do not derogate from special provisions. If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after

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the general Act, the position is even simpler. Having made the general Act, if the legislature afterwards makes a special Act in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act as an exception to the general Act. These propositions appear to me to be beyond discussion at the present day But several cases were quoted before us to show how those principles should be applied. The first was *City and South London Railway Co.* v. *London County Council.*[1] In that case a Railway Company had by its special Act been empowered to construct buildings necessary for its purposes up to a certain distance from the side of a roadway. The by-laws properly made under the general Act applicable to that neighbourhood required other members of the public, if they were constructing buildings, to keep them at a greater distance than that away from the roadway. It was held that the railway's special Act overrode the by-laws made under the general Act in that matter. *The London and Blackwall Railway Company* v. *The Limehouse District Board of Works*[2] was a very similar case. In *The London County Council* v *London School Board,*[3] land was acquired by the School Board under their special Act, and it was held that the Board was entitled to use the whole of that land for its own purposes, providing a school-house and play-ground without leaving a strip of land for the purpose of the adjoining roadway, though under the Metropolis Management and Building Act any other person, who had bought that land and raised a building on it, would have had to leave a strip for the purpose of the roadway. Then there is a case, which is not quite so simple, *Surrey Commercial Dock Company* v. *Bermondsey Corporation.*[4] There the Dock Company within the enclosed area of their own undertaking, as defined by their original Act, erected a building necessary in consequence of works carried out by them under a subsequent Act, which gave them power to construct buildings and drains necessary in consequence of those works. It was held that the general control of the Bermondsey Corporation over buildings gave them no power to interfere with what was done by the Dock Company under their special Act. There it will be observed that the Dock Company were not only erecting a building which was allowed under their special Act but were doing so within the area which under their original Act was under their control and management. In

1 (1891) 2 Q.B. 513
2 (1856) 3 K & J. 122 · 69 E R 1048
3. (1892) 2 Q.B. 606.
4. (1904) 1 K.B. 474.

generating station. There is no reason whatever to suppose that, because they consented, or raised no objection, to the issue of a license for the supply of electricity within the municipal boundaries, they gave up their control over any boiler which might be installed in the generating station. It has not been suggested to us that there is anything to show that they did so.

Then Sir Ramaswami Aiyar suggested that there are provisions about arbitration in the Electricity Act which make it impossible that the local authority should be put in a position of control over the Company. There are provisions that if the Electric Company opens up roads for its purposes and fails to restore them within a certain time, the Corporation may do the work and recover the cost from the Company, and that, if there is any dispute between the two bodies about the cost, the matter shall be decided by arbitration. From that and one or two similar provisions it is suggested that we should infer that the Electric Company and the Corporation are to be regarded as co-ordinate bodies. An examination of the Act will show that that argument cannot be maintained. There is a provision that the Government may in certain circumstances purchase the Electric Company's undertaking and that, if there is any dispute between them about the amount to be paid for the purchase, the question shall be referred to arbitration. It cannot be suggested that, because that provision appears in the Act, we must regard the Electric Company and the Government as co-ordinate authorities in all matters within the sphere of the Electricity Act or connected with the operation of the Electric Company's works so that the Government cannot exercise any control over them. A subsidiary argument about arbitration was urged, namely that S. 19 of the Act provides that

> "A licensee shall, in exercise of any of the powers conferred by or under this Act, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him,"

and sub-section (2) of that section goes on to provide that save in a particular case

> "where any difference or dispute arises as to the amount or the application of such compensation, the matter shall be determined by arbitration."

It is suggested that that indicates that any dispute between the Corporation and the Electric Company in respect of any matter shall be decided by arbitration and the Corporation can exercise no control under its own Act over the Electric Company. But, if a private person suffers nuisance from anybody who conducts operations such as those which come within section 287 of the City Municipal Act, he has his right of suit; but that

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does not prevent the Commissioner from exercising his powers of regulation under the City Municipal Act to prevent inconvenience from being caused. If the intention of the Electricity Act is that a person inconvenienced by the Electric Company, instead of having a right of suit, must refer his dispute to arbitration, how can that in any way affect the power of the Commissioner to exercise his control under the City Municipal Act? The two things are not connected in the way suggested.

What at first sight might appear a more powerful argument for the Electric Company is that it is a public utility company operating under a statute with compulsory obligations to the public, which can be enforced by penalties. It has been suggested that such a Company, performing compulsory duties, must be regarded as exempt from the control of the local authority. In that connection several interesting cases were cited before us. In *Uckfield Rural Council* v. *Crowborough District Water Company*,[7] the water company under its special Act had been empowered to build a water-tower in a particular place; nevertheless they were held to be subject to the control of the District Surveyor, to whom they had to submit the plans and sections of their proposed water-tower before its erection. There was a public utility company operating under its own private Act and proposing to build a tower in the very place where the Act empowered it to build it, and yet it was held to be subject under the general law affecting the neighbourhood to the District Surveyor, who had his duties to protect the interests of the public by seeing that it was a safe and properly constructed building. *Moran & Son, Ltd.* v. *Marsland*[8] has also been quoted, another waterworks case, in which the company were empowered by their special Act to construct a reservoir in a particular place and yet were held to be subject to the general law in the matter of submitting their plans for the approval of the District Surveyor. That case is interesting because Lord Chief Justice Alverstone, who presided over the Bench, also presided over the Bench which decided *Surrey Commercial Dock Company* v. *Bermondsey Corporation*.[4] *London County Council* v. *Wandsworth and Putney Gas Co.*[9] is a similar case. *London County Council* v. *District Surveyors' Association and Willis*[10] is an interesting case. There a building was erected by the local authority itself in discharge of its own statutory duties for the

4 (1904) 1 K.B. 474. 7. (1899) 2 Q.B. 664.
8. (1909) 1 K.B. 744. 9. (1900) 82 L.T. 562.
10. (1909) 2 K.B. 138.

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purpose of a school-house, which was approved by the Board of Education, the department of Government concerned; and yet the Court held that the building required also under the general law the approval of the District Surveyor. In that case it was urged that, if the local authority in the matter had to submit to the control of two other authorities, the Board of Education and the District Surveyor, there might be a conflict of authorities. But Lord Alverstone was not moved by the argument and said that there was no reason why the local authority should not satisfy the requirements of both the other authorities. *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe*[11] is perhaps an even more marked case. There the Electric Supply Corporation wished to build a street-box for the purpose of their supply-lines, and they proposed to do so, as required by their Act, in accordance with the regulations of the Board of Trade. They obtained the approval of the Postmaster-General, as required by their Act. They also obtained the approval of the road authority. Nevertheless the Court held that under the general law they were bound also to obtain the approval of the District Surveyor, who had public interests to guard different from those which the other authorities had to protect. There it will be seen that there were four authorities concerned, who might have been in conflict. But Wills, J., when that suggestion was put forward, replied that it might be supposed that the authorities were reasonable men, who would adjust their requirements in the interests of the public. Those cases are interesting because they concerned statutory bodies or public utility bodies working under private Acts of their own, all of which had compulsory duties to perform enforceable except in the case of the School Board by penalties, and in two of the cases there was a possibility of conflict between the various authorities which they had to satisfy. But in each of those cases it was found that there was no inconsistency between the special Act and the general Act, and therefore the bodies concerned were subject not only to the provisions of their special Acts but also to the provisions of the general Acts.

We need not go so far as England to find cases where persons are required to take out licenses from two authorities in regard to the same matter. Under the Arms Act, if a shopkeeper in Madras wishes to sell arms and ammunition, he must get a license from the Commissioner of Police as representative of the Government; but he must also get a license from the

11. (1903) 88 L.T. 772.

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Commissioner of the Corporation for storing ammunition. If a shop-keeper wishes to sell alcoholic spirits, he must get a license from the Abkari Department; but he must also get a license from the Commissioner of the Corporation for storing the spirits. If one of the oil companies which supply this country wishes to have an oil-container for anything over 500 gallons of petroleum, it must get a license from the Government under the Petroleum Act. But, if it wishes to have a container within the limits of the City of Madras, it must also get a license from the Commissioner of the Corporation. That instance perhaps illustrates best the necessity for such double control. It is possible that one of the oil companies might acquire a strip of land along the Marina and propose to build there a number of huge oil-containers. The authorities concerned under the Petroleum Act might issue a license for that, having first assured themselves that the containers and the installation would be safely constructed and would cause no danger to the public. But the Commissioner of the Corporation, if he was asked for a license for storing oil in those containers, would very properly refuse to grant it, refuse to allow a row of huge and hideous containers to be built upon the edge of the Marina and so spoil one of the great attractions for which this City is famous all over the world. He would then be acting under the powers given to him by the City Municipal Act for the general comfort and convenience of the inhabitants of Madras. There is nothing inconsistent in the sanction of two authorities being required in cases such as that.

But, if Sir Ramaswami Aiyar is not able to satisfy us that in this case we have a special Act or anything equivalent to a special Act in conflict with a general Act, he is prepared to go almost to the other extreme and has urged in another part of his argument that, so far from being a special Act, the Electricity Act is a Code containing the whole law on the subject of electricity in such a comprehensive way that those who get licenses under the Act are free from the control of any other law or authority in respect of their operations, buildings, machinery and apparatus. That, I think, is a contention very difficult successfully to maintain. To begin with, the Electricity Act does not purport to be a Code. It does not even purport to be a consolidating Act like the Arms Act, the Abkari Act or the Petroleum Act. It is an Act to amend the law relating to the supply and use of electrical energy. So far from being obviously complete in itself, as I have mentioned, a great deal of time was spent before us in trying to ascertain whether a license issued

under this Act can extend to a generating station and whether, as I have assumed, a license under the Act can be held to include a license to generate electricity. It is quite clear that the Act is directed to the supply and use of electricity and not primarily to generation. If we examine the Act, I think it is clear that it is not intended to be a comprehensive Act and to include everything concerning the generation, supply and use of electrical energy. If a man wishes to establish a station to generate electricity for his own domestic or industrial purposes or for conducting scientific experiments, he does not require any license under the Act whatever. In my opinion the Act can in no sense be described as a "Code" unless we use that word as meaning an Act including all the provisions which the legislature has thought it necessary to enact on any particular subject, whether those provisions are very restricted or very comprehensive. Speaking for myself, I see no purpose in using the word "Code" in that sense. What is more interesting and noticeable about the Electricity Act is that there are no words in it such as those I have mentioned in the Railways Act—"notwithstanding any other enactment in force" or anything of that sort. There is nothing explicit in the Act to show that it was intended to exclude the operation of any other Act. It will be seen that there is nothing in the Act to show what kind of machinery may be used in the generation of electrical energy, what kind of apparatus may be used in connection with the motive-power selected, or what authority is to control the use of that machinery or the use of that apparatus except S. 37 (2) (*f*), which empowers the Governor-General in Council to make rules for the whole or any part of British India for the protection of persons and property from injury by reason of contact with, or the proximity of, or by reason of the defective or dangerous condition of, any appliance or apparatus used in generation. Sir Ramaswami Aiyar suggests that that rule-making power excludes the control of any local or other authority. I cannot agree with him. The power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary. We are asked to suppose that, because in their license the Electric Company are empowered to have a generating station somewhere within the limits of Madras, they are free from the ordinary control of the local authority in respect of the steam-boiler which they use to provide motive-power for generation. It is the steam-boiler with which we are concerned in this case. We have ascertained that, in spite of this suggestion that the Electricity Act

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is a Code complete in itself, which excludes the operation of all other Acts and authorities, this very steam-boiler is regularly inspected by the Inspector of Boilers under the Boilers Act; and it has not been suggested to us after the discovery of that fact that the Boilers Act does not apply to this boiler. Under the Boilers Act no one is allowed to use a boiler of more than five gallons in capacity until it has been examined by the Inspector of Boilers and a certificate has been obtained from the Chief Inspector of Boilers fixing the pressure up to which it may be used. A licensee under the Electricity Act is subject to the control of the Boilers Act in that way just as every one else is. But that is impossible to fit in with the theory that the Electricity Act and the license issued under it have the effect that those who get the license are exempt from the control of any authority under any other Act. Nor can it be supposed that, if the Electricity Company now wished to extend their generating station by raising another building, they could ignore the building regulations, to which every one else in Madras is subject, that they could raise the building to any height they liked, could make it overhang a public highway, could ignore all sanitary regulations, or so arrange that the drainage from the building went, not into the municipal system of drains, but into a public road. I can see no reason whatever for supposing that, because the Electric Company have got a license under the Electricity Act, they are free from the building regulations in such matters. Nor can it be suggested reasonably that, if they chose to give up steam as their motive-power for generation and to instal petrol-engines for that purpose, they could store petrol to any amount for their engines without obtaining any license for doing so. Nor can we suppose that, because this boiler is often subject to the inspection of the Inspector of Boilers, the control of the Commissioner of the Corporation under S. 288 of the City Municipal Act is excluded. The Inspector of Boilers looks to the safety of the boiler. He has to see that it is in proper working order and has to see that it is not used at an excessive pressure. But the Commissioner of the Corporation in the interests of the public may have other matters to look to. Under the section he may refuse to give permission for the use of a boiler if in his opinion its position is objectionable. If, for instance, the boiler was put close to a public highway without any wall between it and the road so that, when the furnace was open, sparks might fly out on to passing carts, the Commissioner might very reasonably say that that position was very objectionable, though the Inspector of Boilers thought it quite

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safe from his point of view, as the boiler was not likely to explode. Under S. 288 (3) the Commissioner is empowered to insist that any chimney in connection with any steam-boiler in the City shall be of such height and dimensions as he may fix. That may be a most important point; as, if the chimney from the furnace of this boiler were too low, it might happen that in the prevailing winds smoke from the chimney would blow regularly every afternoon into a mosque or into a fruit market. The control of the Commissioner would be very necessary in the interests of the inhabitants of Madras or those of that part of the town in such circumstances. There is therefore nothing unreasonable in this boiler being subject to the control of the Commissioner under S. 288 of the City Municipal Act.

Finally it has been suggested, as in the other case, that the Commissioner might exercise his powers in connection with this boiler in a perverse and unreasonable way and so bring the operations of the Electric Company to a standstill. In regard to that it may be noticed that, if the Electric Company had proceeded under the City Municipal Act in the first instance, they would have obtained the permission of the Commissioner before the boiler was put up and so there would have been no likelihood of their operations being broken off by any order of the Commissioner. But apart from that the contention that the Commissioner might act in an arbitrary and perverse way so as to bring the operations of the Electric Company to a standstill is in my opinion of no weight whatever. Apart from the facts that his powers are given to him for regulation, not for prohibition, that he has to give reasons for his orders and that there is an appeal against his orders, the possibility that he might act perversely is no reason for questioning his powers. The dhobies of Madras perform services for the citizens of Madras at least as important as the service performed by the Electric Company. Most people, I suppose, would agree that it is more essential to have clean clothes than to have electric light. The dhobies of Madras might very well think that they carry on their occupation by a higher right than a license from the Government, that they do so by custom, tradition, birth and caste. But, if they were to refuse to submit to the control of the Commissioner under S. 287 of the City Municipal Act on the ground that they feared that the Commissioner might be so perverse as to prohibit them from washing clothes within the City of Madras at all, would any one listen to them for a moment? All of us are subject to various authorities. We cannot escape submission to those authorities by saying that we fear that the powers of the

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authorities will be abused. If that were allowed, all Government and administration would be at an end.

In my opinion there is nothing inconsistent between the Electricity Act or the license issued under it to the Electric Company and the City Municipal Act in respect of the boiler with which we are concerned, and there is no reason to suppose that the Electric Company are exempt from the control of the Commissioner of the Corporation under S. 288 of the City Municipal Act. In my opinion this appeal also should be allowed with costs throughout, and a declaration should be made that the Electric Company are not entitled to use the steam-boiler in their generating station without obtaining the permission of the Commissioner of the Corporation under S. 288 of the City Municipal Act.

In each of these appeals the Advocate's fee allowed will be Rs. 250.

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Anantakrishna Aiyar, J.—L.P.A. No. 265 *of* 1927.—I agree. It is enough for the disposal of this particular appeal to consider the provisions of the Tramways Act. The argument in the Lower Court, as far as I could see, did not proceed after having due regard to the special provisions of the Tramways Act. The two cases seem to have been argued on a common basis, namely, whether when a special Act contains provisions and confers special powers, they could be taken to be in any way affected by the general powers conferred upon another body by a later general Act. That is the question which will have to be discussed in detail in the connected appeal. For the purpose of disposing of this appeal, as was pointed out by my learned brother, it is unnecessary to discuss this question. However convenient it might be for the Tramway authorities to own and possess workshops of their own, the Act, for reasons best known to the legislature, has not provided for workshops to be necessarily owned by Tramway Companies as part and parcel of their undertaking. That being so, the basis of the distinction which the learned advocate for the Tramways Company sought to rely upon fails. It is unnecessary for the purpose of disposing of this appeal to say more on this particular point. I may, however, say, as the question has been very fully discussed before us in the connected appeal, that even if I should be mistaken in my above view regarding the Tramways Act, there is nothing in that Act which, in my view, would preclude the application of S. 287 of the City Municipal Act. There is really nothing inconsistent in the provisions of the two Acts on the point now before us. As I propose to

say something on the rules governing the applicability of a special law in relation to a later general enactment in the connected appeal, I do not think it necessary to say more at this stage.

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I agree that the appeal should be allowed. I also agree to the form which the decree is to take in this particular case.

L.P. Appeal No. 264 *of* 1927.—I agree that this appeal should be allowed. The question that arises in this case is whether the Madras Electric Supply Corporation, hereinafter called, for purposes of this judgment, the Company, should take the permission of the Commissioner of the Corporation of Madras in connection with a steam-boiler which the Company has installed in its workshops and generating stations at Basin Bridge. The learned City Civil Judge, and on appeal the learned Judge of this Court, both held that the Company was not bound to take the permission of the Commissioner under S. 288 of the City Municipal Act. It was argued by the learned advocate who appeared for the appellant—the Municipality—*first*, as a sort of a preliminary objection, as I understood him, that the Electricity Act deals only with the supply of electrical energy and not with the generation thereof and accordingly the boiler admitted to be installed for the purpose of generating electrical energy could not possibly come within the scope either of the Act or of the license which the Company has got from the Government under the Indian Electricity Act. If this objection is sustained, then straightway the appeal has to be allowed. I may mention that this objection was not taken either in the Lower Court or before the learned Judge on appeal. The provisions of the Electricity Act have to be carefully examined for the purpose of deciding whether there is really anything in the objection. No doubt the preamble of the Act speaks of the supply and use of electrical energy, but I do not think that that should be taken to be conclusive of the matter. Though I cannot say the Act is very clear, yet, having regard to the various sections of the Act to which our attention was drawn by the learned advocate for the Company (respondent), I do not think that this appeal should be allowed on such a narrow ground as the one suggested by the learned advocate for the appellant. Ss. 7, 32, 33, 34 and 37, among other sections of the Act, deal with generation of electrical energy; and there are provisions in the Act, in cases where the license is revoked, as to whether the generating Station also passes to the purchaser to whom the property may be sold,—the policy of the Act being that in the absence of a declaration that the generating station should not be taken to be part of the undertaking, it would pass. S. 37

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which empowers the Governor-General to frame rules also refers to rules that may be made with reference to the generation of electrical energy. Further, there is the definition of the word "works" in S. 2, cl. (*n*). "Works" includes any building, machinery, etc. and though it would have been more satisfactory if the Act had been more explicit regarding generating stations also, I think, having regard to the observations of Scrutton, L.J., in *Farnworth* v. *Manchester Corporation*,[12] that the word "works" includes buildings, and, therefore in such cases, should be taken to include generating stations also in the absence of anything to the contrary. The following are the observations at page 541:—

"The Company could construct such works (which include buildings and generating stations) as were necessary and incidental to such supply."

The heading of the English Statute which was the subject of discussion in the English case was also similar to the heading and preamble of the Indian Act, namely, for the supply of electrical energy, etc. On the whole, I have come to the conclusion that I should not uphold the preliminary objection and dispose of the appeal on that basis only. I therefore propose to proceed to consider the appeal on its merits.

Another point was raised by the learned advocate for the appellant, namely, that, as the Electricity Act on which the Company relies is an Act of 1910 whereas the City Municipal Act is one of 1919, the later Act should be taken to overrule the provisions of the earlier Act, and that without considering anything else for the purpose of disposing of this appeal, the earlier Act should, if I understand him properly, be ignored. I do not think that this is a proposition to which I can accede. Various decisions were brought to our notice by the learned advocate for the respondent where Courts had to consider the effect of two Acts; one special but earlier Act and a second, a general but later Act; and the mere circumstance that the general Act was one of later date has not been held in any of the cases to conclude such a question. I therefore think that the second point on which the learned advocate for the appellant relied is also not sustainable.

A third point was raised by him, and it turned on the provisions of the City Municipal Act. The learned advocate drew our attention to various sections of the Municipal Act which contain exemptions either in the case of certain persons or in

12. (1929) 1 K.B. 533 at 541.

the case of particular kinds of property from taxation. He drew our special attention to Ss. 101 and 102 and observed that under S. 102 the Madras Port Trust, which under a prior Act enjoyed exemption from taxation, has been brought in, though made liable only to pay a lower rate of tax. But I think that such considerations, though relevant, are not in any way conclusive of the real question before us which has to be decided on a reference to the particular provisions relevant to the case. Again it cannot be said that, because the Electricity Act contains certain provisions authorising the Company to break open highways for particular purposes, their powers are confined only to the same and that they enjoy no other rights under the Act. As I said, all this would be of use in construing the particular provisions of the Acts which are alleged to be consistent or inconsistent with each other, but by themselves these considerations would not be conclusive on the question before us.

On the other hand, on the side of the respondent-company, the learned advocate argued that, because certain obligations were imposed upon them by statute, therefore it must be taken that all incidental and subsidiary rights which they should have for the purpose of properly exercising their operations with a view to discharge their obligations should be taken to have been preserved to them and not in any way affected by any other enactment. He drew our attention particularly to S. 3, sub-cl. (1), S. 4, sub-cl. (11), S. 22 and S. 42 among others of the Electricity Act. It is true that obligations are imposed on the Company by the Act and by the license, but the mere fact that certain obligations are imposed and even penalties attached for the non-fulfilment of those obligations does not in my opinion free them from obligations imposed by other enactments, if on a proper construction of such other enactments the Court comes to the conclusion that they are liable to those other obligations also. The existence of such obligations does not necessarily give them a free exemption from provisions of other Acts which have operation over a particular locality or over the people inhabiting or carrying on operations in a particular place. No doubt in construing any particular provision on which the decision of a case might turn, it would be legitimate to have this consideration also in view, but it should not be taken to be in any way conclusive of the question. Similarly, another argument was advanced by the learned advocate for the respondent that the Electricity Act should be taken to be a Code in itself and that the rights and liabilities of the parties should be adjudicated upon only on the basis of the provisions contained within the

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four corners of the code and the rules framed thereunder. I am unable to agree. It is not necessary for me to go through the ground covered by the judgment of my learned brother on this point. The admitted existence of control under the Boilers Act appealed to me in this connection. On going through the Electricity Act, I find that the Act does not make provision for many things for which one would expect provision to be made in the Act if it was intended to be a code: for the essence of a code is to be exhaustive. As I said, this was a new argument suggested by the learned advocate for the respondent before us, and for the other reasons given by my learned brother I do not think that we must proceed on the footing that the rights and liabilities of the parties are governed only by the provisions of the Electricity Act and the rules framed thereunder and by no other enactments outside the same.

Having now noticed the preliminary arguments, so to speak, urged by the learned advocates who appeared in the case for either side, I proceed to discuss the real question that arises for decision. Before doing so I may state that the general rule of construction of statutes contended for by the learned advocate for the respondent is not open to question. The learned advocate for the appellant does not question the rule and a reference to legal authorities makes it absolutely clear that the rule contended for by the respondent has been taken to be the rule in existence from very early times. The learned advocate for the respondent referred us to a case in *Barker* v. *Edger*,[13] the particular passage he referred to being at page 754. It is a judgment of the Privy Council; Lord Hobhouse remarked as follows:—

"The general maxim is '*Generalia specialibus non derogant.*' When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

Speaking with reference to this principle, Lord Justice Turner observed as follows in *The Trustees of the Birkenhead Docks* v. *The Birkenhead Dock Company*[14]:

"The rule seems to be a very ancient and settled principle of law. That appears to be the rule as laid down by the learned Judge Jenkins in Sir Foulke Grevil's case (reported in his work called 'Eight Centuries of Reports'—the Third Century, case 41, page 120). Although the principle of law is not open to any doubt, difficulty often arises in its application to particular cases."

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13. (1898) A.C. 748.

14. (1853) 23 L.J.Ch. 457.

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In this case no reference is made to any steam-boiler in the Act, or in the license granted to the Company. Reliance is placed by the Company on cl. (7) (*f*) of its license which is to the following effect: "The generating station is to be within the area of supply." If I understood correctly the argument of the learned advocate for the respondent on this point, his argument seems to be this: The Electricity Act is a special Act; the license is given under that Act; the license must be taken to incorporate all the relevant portions of the Act into it; the license states that the generating station is to be within the area of supply. Under R. 4 the area of supply is practically the whole of the City of Madras; therefore, it was argued that this gives the Company an unrestricted right to erect a generating station anywhere within the twenty or thirty square miles of Madras, and for that purpose to instal steam-boilers anywhere it liked within that area. In support of this position certain English and Indian decisions were referred to.

On behalf of the respondents great reliance was placed on three English decisions reported in *City and South London Railway Company* v. *London County Council*,[1] *London County Council* v. *London School Board*[3] and *Surrey Commercial Dock Company* v. *Bermondsey Corporation*.[4] In the first of the above cases, a railway company had obtained statutory powers to make an under-ground railway with all necessary works connected therewith and to take and use such of the lands delineated on the deposited plans as might be required for that purpose. The Company built a station which was found necessary for the purposes of the railway within the limits of deviation, a part of which projected beyond the general line of buildings in the street. It was held that S. 75 of the Metropolis Management Act of 1862 did not apply. Lindley, L.J., observed at page 521 as follows:—

"Upon the true construction of the special Act it is impossible to read the special and the general Acts together in such a way as to make them harmonise . . . The limit set by the Act of Parliament is set geographically by the lines delineated on the plan, and is set also by the condition that every structure shall be necessary for the purposes of the undertaking."

Fry, L.J., observed at page 525:

"It is obvious, therefore, to my mind that that clause (in the special Act is inconsistent with the general statute "

1. (1891) 2 Q.B. 513. 3. (1892) 2 Q.B. 606.
4. (1904) 1 K.B. 474.

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Similarly, Lopes, L.J., remarked at page 526:

"I think that the construction which I put upon this section makes it inconsistent with the general statute."

Holding therefore that the provisions of the special Act were inconsistent with the provisions of the general Act, the Court held that the special Act prevailed.

In *London County Council* v. *London School Board*[3] it was held that the statutory power to erect a school on a particular site was inconsistent with the application to that building of the provisions of the Metropolis Management and Buildings Act (Amendment Act), 1876, forbidding the erection, without the consent of the Metropolitan Board of Works, of any building, wall or fence, within twenty feet of the centre of a highway. There, too, the Court held that where there was an inconsistency between a special Act and a general Act, the special Act should prevail.

In the third case *Surrey Commercial Dock Co.* v. *Bermondsey Corporation*[4] it was held that where a dock company obtained statutory authority to make certain alterations in their dock premises, and it became necessary as ancillary to those alterations to demolish a certain workshop and erect another in its place, it was not necessary to give notice to the local authority of their intention to erect the new workshop; the Court held that the interference and control involved in S. 76 of the Metropolis Management Act was inconsistent with the powers conferred upon the dock company under their special Act.

These cases were considered in a later case reported in *Moran & Son, Ltd.* v. *Marsland.*[5] A water company was empowered by a special Act to make and maintain in the lines and situation and according to the levels shown on the deposited plans and sections, the reservoirs . . . and other works for collecting and distributing water. The company built two big reservoirs under powers given to them by the Act. Under the London Building Act the builder or other person causing or directing the work to be executed shall serve on the District Surveyor a building notice respecting the building or structure or work. The District Surveyor was bound to supervise any building or work affected by the provisions of the Act for securing the due observance of the provisions of the Act and by-laws. Some particular buildings were exempted from the

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3 (1892) 2 Q.B. 606

4 (1904) 1 K.B. 474.

5 (1909) 1 K.B. 744.

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operations of the Act. The question arose whether it was the duty of the District Surveyor to supervise the construction of these reservoirs and whether he was entitled to the fees specified by the London Building Act for such supervision. The Magistrate observed as follows at page 748:—

"I do not see anything inconsistent between the powers of the water works company and the powers of the surveyor under the Building Act, and I accordingly make an order for payment of the sums claimed by the District Surveyor I have arrived at this conclusion in consequence of the decisions of the Judge of the High Court in the cases reported in *London County Council* v *Wandsworth and Putney Gas Company*[9]; *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe*[11] and *Whitechapel Board of Works* v. *Crow*[15]

On a case stated by the Magistrate, the Court upheld his view. Lord Alverstone, C.J., after noticing *City and South London Railway Co.* v. *London County Council*[1] and *London County Council* v. *London School Board*[3] and distinguishing them proceeded to observe as follows with reference to *Surrey Commercial Dock Co.* v. *Bermondsey Corporation*[4]:

"There the dock company had special statutory powers to construct certain works, and I will assume that the deposited plans did not specify in detail the mode in which those works were to be constructed. In carrying out those works it became necessary as ancilliary thereto to demolish a workshop and to erect a new workshop in its place. The question arose under section 76 of the Metropolis Management Act which provides for notice to be given to the local authority before beginning to lay down or dig out the foundations of any new house or building or to rebuild any house or building. I was a party to that decision, and we held that the interference and control involved in S 76 of the general Act of 1855 were inconsistent with the powers conferred upon the dock company by their special Act, and that therefore the dock company need not give notice to the local authority of their intention to erect the new workshop. We did not rely solely upon the section of the special Act which gave the company power to construct the works, but, taking that section with other sections in the Act, we thought that the provisions of section 76 of the general Act were inconsistent with the powers conferred upon the company by their special Act The question therefore before us is whether section 5 of the special Act of 1894, which gives power to the water company to make and maintain the reservoirs is inconsistent with the supervision of the District Surveyor under the London Building Act, 1894. In my opinion it is not."

The learned Chief Justice made the following further observations with reference to the other English cases quoted before him:—

"It cannot be put higher than the provisional order authorising the construction of the street box under the foot pavement in the street in the three cases I have mentioned in the earlier part of this judgment (*Law Times cases*), where the requirements of the Board of Trade and of the Postmaster-General had to be complied with In those cases this Court was of

1 (1891) 2 Q.B. 513. 3. (1892) 2 Q B 606.
4 (1904) 1 K.B 474 9. (1900) 82 L.T. 562.
11. (1903) 88 L.T. 772. 15. (1901) 84 L.T. 595.

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opinion that there was nothing in the control given to the Board of Trade and to the Postmaster-General which ousted the right of supervision given to the District Surveyor. We are bound by those cases, and they seem to me to be indistinguishable from the present case."

Bigham, J., remarked at page 758 as follows:—

"Under section 138 of the London Building Act every building or structure shall be subject to the supervision of the District Surveyor. I do not feel disposed to place any limitation upon those words unless the provisions of the special Act are inconsistent with the supervision of the District Surveyor over the particular work. I cannot find anything in the special Act which is inconsistent with the application of that section to the construction of these reservoirs. As, therefore, there is nothing inconsistent therewith in the special Act, and as the London Building Act applies to all buildings and structures, it is the duty of the District Surveyor under the Act to supervise the construction of the reservoirs, and he is entitled to fees for the work of supervision."

Walton, J., agreed and made the following observations at page 759:—

"It is then said that even if there are certain requirements of the London Building Act, 1894, which will *prima facie* apply to these reservoirs, still the provisions of the special Act, under which the reservoirs were constructed, are inconsistent with the supervision of the District Surveyor, and that therefore the sections of the general Act relating to the supervision of the District Surveyor do not apply. I have not myself seen anything in the special Act which is inconsistent with the requirements I have referred to. There seems to me to be nothing in the special Act which prevents the sections of the general Act relating to supervision from applying to the construction of these reservoirs. It is not our province to consider whether the supervision of the District Surveyor in a case like the present is useful or necessary for the protection of the public. We have only to consider whether the case comes within the Act, and, in my opinion it does."

On behalf of the appellant we were referred to *Uckfield Rural Council* v. *Crowborough District Water Company*,[7] *London County Council* v. *Wandsworth and Putney Gas Co*.[9], *Galbraith Brothers* v. *Dicksee*,[16] *Moran & Son, Ltd.* v. *Marsland*[8] and *London County Council* v. *District Surveyors' Association and Willis*.[10]

In *Uckfield Rural Council* v. *Crowborough District Water Company*,[7] a water works company by a special Act was empowered to erect and maintain a water tower in a specific place. Under S. 157 of the General Public Health Act, by-laws were made by which any person intending to erect a building should give the local authority notice of his intention and of the date on which the building was to be commenced, and also deliver to them plans and sections of it, and a description of the materials with which it was to be constructed. The Court held that the

7. (1899) 2 Q.B 664.
8. (1909) 1 KB 744.
9. (1900) 82 L.T. 562.
10. (1909) 2 K.B. 138.
16. (1910) 102 L.T. 890.

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water works company were bound to comply with the by-laws made by the local sanitary authority. Ridley, J., was one of the members of the Court which decided this case and some of the other cases relied on by the appellant. A few sentences from the judgment of the learned Judge Ridley, J., show the reasoning of the learned Judge for his decision:

"The Crowborough Water Company, under section 25 of the special Act, had authority to put up a water tower in a particular field. The question for our determination is whether they were entitled to do it without submitting plans and sections to the district council, and giving the council notice before beginning the work, in accordance with by-laws 93 and 94 made by the district council under the Public Health Act, 1875. I am of opinion that the water company were not so entitled. It was contended on their behalf that when once they had authority, under their special Act, to put up the tower they might put it up as they chose. I cannot accept that view The precise effect of the special Act is to give them power to put up in another person's field a water tower—that is, they had power to put up the tower in that field as though the land was their own. They required a statutory power in order to enable them to take and use the land. When they had got as far as that they were, in my opinion, in no better position than the private owner who, along with them and all others, must, unless specially exempted by some statutory provision, comply with the provisions of the Public Health Act, under which Act the local authority may make by-laws with respect to the commencement and construction of new buildings It was contended for the respondents that they were not bound by the by-laws, and that the Public Health Act, 1875, did not apply to them because it was not incorporated with their special Act. . . . But it does not follow that, because the Public Health Act, 1875, is not incorporated with the special Act, the water company are not bound, like everybody else, by the provisions of the earlier Act. If the directors of the water company were, in putting up their water tower, to commit a breach of the criminal law, it could not be contended that the criminal law did not apply to them; yet the argument put forward on their behalf must mean that no Act of Parliament bears upon them at all unless specially mentioned in their special Act. The real question is whether, under section 93 of the Waterworks Clauses Act, 1847, the water company are protected against the provisions of the Public Health Act, 1875, or are subject to those provisions. I am of opinion that the water company are not exempted from those provisions."

Again at page 671 the learned Judge proceeded as follows:

"The principle laid down in them comes to this: that if there is an inconsistency between a special Act and a general Act the provisions of the special Act are not overridden by those of the general Act."

His Lordship quoted *City and South London Railway Co. v. London County Council*[1] (the railway case), and observed with reference to that case as follows at page 672:—

"The Court of Appeal held that the powers given by the special Act were inconsistent with those given by the general Act, and on that ground they held that the county council could not interfere with the building. I think it is clear that but for that inconsistency the decision would have been otherwise There is no such inconsistency in the present case The

1 (1891) 2 Q.B. 513

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power given to the water company is to put up a water tower in a particular field—nothing more. If the district council had required that it should be put up in another field they would have required something inconsistent with the power given to the water company by their special Act. What the county council did in fact require did not affect the power of the water company under their special Act."

It must be noted in connection with this case that the water company in question was bound to supply a certain quantity of water to the area concerned, and yet it was held that the water company was subject to the provisions of the Public Health Act, and bound to give notice as required by the by-laws and supply plans, etc., to the local authority in connection with any building which the water company might put up in carrying out its work and discharging its obligations.

In my opinion this last case is very similar to the case we have to decide, and adopting the reasoning of Ridley, J., we have to hold that the respondent is subject to the provisions of section 288 of the City of Madras Municipal Act. The decision in *Uckfield Rural Council* v. *Crowborough District Water Company*[7] has been followed in the two cases reported in the English *Law Times* mentioned already.

Having examined the provisions of the Indian Electricity Act, the license given to the respondent, and the provisions of the City of Madras Municipal Act, it seems to me that there is no inconsistency in applying section 288 of the City of Madras Municipal Act to the respondent. I do not understand that the plans deposited by the respondents mentioned anything about any steam-boiler, or about the position in which it was to be installed. The reasoning adopted by the English Courts in the cases cited on behalf of the respondent does not, in my opinion, apply to the present case. The position of a Railway Company, authorised by its special Act to put up any buildings necessary for their purpose in the place covered by the lines marked in the plans deposited, is different from the position of the respondent who is only bound to have the generating station within the City of Madras (a rather wide area) and not on any specified plot. The respondent's case is also different from the case of an authority entitled to put up a school building on a particular plot. The present case would seem to be similar to the class of cases decided by Ridley, J., referred to above. I may also observe that the circumstance that the plan deposited might show the necessity for a building and even its position would not necessarily lead to the inference that all outside supervision

7. (1899) 2 Q.B. 664.

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under the general Act is necessarily excluded. I may in this connection quote the following passages from the judgment of Lord Alverstone, C.J., in *Moran & Son, Ltd.* v. *Marsland.*[8] At page 755 it was observed:

"It was suggested that the deposited plans gave such a description of the reservoir as to render the supervision of the district surveyor unnecessary, inasmuch as they indicated how the work was to be carried out. We have seen the deposited plans, and they seem to us to contain nothing more than ordinarily appears upon such plans, such as the site, levels, and size of the reservoir. They do not prescribe, for instance, how the reservoirs are to be constructed, the quality of the bricks, stone, or other materials, or how those materials are to be bonded or put together, nor do they contain any provisions for the safety of the public. Therefore the case raises the simple question whether the mere statutory power to construct a work such as a reservoir is of itself sufficient to oust the application of those provisions of the London Building Act, 1894, which relate to the supervision of the district surveyor. Speaking for myself, I have no doubt that some of the things which have been mentioned to us—such, for instance, as the thickness of the concrete, the quality of the mortar, and the mode of binding the materials together—require careful supervision, and I have no doubt that proper supervision is given by competent engineers. But I can see nothing in the special Act to show that the supervision which must be exercised by the engineers is to supersede the supervision of the district surveyor."

In In re *Verrall: National Trust for Places of Historic Interest or Natural Beauty* v. *Attorney-General,*[17] Astbury, J., observed that

"A private Act cannot exclude application of public Acts unless and to the extent that the powers are expressly excluded or rendered impossible of application by necessary implication."

In Halsbury's Laws of England, Vol. 27, the law on the point is stated as follows in paragraph 322 at page 169:

"Where in the same or a subsequent statute a particular enactment is followed by a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply."

In paragraph 362 at page 186 it is stated that

"A special statute containing no provisions inconsistent with a general statute, is, however, controlled by the latter, even if this is not expressly incorporated."

It is clear that similar difficulties have arisen in England with reference to disputes arising between companies which are in the position of the Electrical Company here and local authorities, and Courts have come to the conclusion that unless there be real inconsistency between the two Acts, such companies come under the supervision imposed by the local Acts also. Now

8. (1909) 1 K.B. 744.

17. (1916) 1 Ch. 100 at 108.

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in the present case all that we have got in the license granted to the respondent is that the generating station should be within the City of Madras. Further, as I have already remarked, there is nothing in the Act or the license about erecting any steam-boiler. Electricity can be generated either by the aid of steam-boilers or otherwise. If the Company's present contention be upheld, it would necessarily follow that if to-morrow they should make up their minds to generate energy by other means, then they should have the same privileges attached to them with reference to the new machinery and apparatus which they might like to bring into existence for the purpose. Again, how is the existence of a power in the Commissioner under S. 288 of the City Municipal Act in any way inconsistent with the exercise of such rights by the Company? It was argued that the Commissioner might in his discretion refuse permission and that such an order might be upheld by the Standing Committee on appeal. If there were proper grounds for such refusal, the Commissioner would be right in his view, as also the appellate authority. But if the suggestion is that the power is likely to be misused by the Commissioner, then the answer should be that the Court has no business to assume misuse of power by any officer in whom it is vested by law. If in any particular case a person invested with such authority be found to have exercised it on irrelevant grounds or to have brought to bear upon his decision considerations which should not have been brought to bear upon the same, then Courts are available to persons who feel themselves aggrieved thereby. I do not think that such an argument should be allowed to have undue weight in the matter of construction of these two Acts.

Then something was mentioned with reference to the admission said to have been made in the Lower Court on the side of the Municipal Corporation. All that I understood that the admission was really meant to amount to was this:—Having regard to the way in which the Electric Company is at present carrying on its operations, a steam-boiler is necessary for the purpose of generating electrical energy. As I said, nothing really turns upon the admission. We have to construe the provisions of the two Acts; and having regard to the way in which Acts similar in scope have been construed by Courts in England, I do not feel any difficulty in coming to the conclusion that the provisions of the two Acts are not in any way inconsistent and that the two can stand together and have operation so far as the point before us is concerned.

Then, two Bombay decisions were quoted before us, and it was argued that the same construction should be placed on the Electricity Act. The decisions are reported in *Municipal Commissioner of Bombay* v. *G. I. P. Railway Co.*[6] and *G. I. P. Railway Co.* v. *Municipal Corporation of the City of Bombay.*[18] S. 7 of the Indian Railways Act contains the following provision:

"Notwithstanding anything in any other Act for the time being in force."

With these words occurring in a particular enactment, it is impossible to say that any other general enactment should be allowed to have operation against the positive wordings and specific provisions of that particular enactment.

Section 288 of the Madras City Municipal Act enacts as follows:—

"(1) No person shall, without the permission of the Commissioner, erect anywere any steam-boiler or machinery by the use of which smoke, smell, noise, vibration, dust or floating particles of combustible or other matter are produced, or danger is likely to arise to the inhabitants of the neighbourhood.

(2) The Commissioner may refuse to give such permission if he is of opinion that such boiler or machinery in the proposed position is objectionable by reason of the density of the population in the neighbourhood or will be a nuisance to the inhabitants of the neighbourhood, or may grant such permission under such restrictions and regulations as he thinks fit.

(3) All chimneys in connexion with any steam-boiler or machinery erected within the City shall be of such height and dimensions as the Commissioner may determine."

Under that section it will be noticed that the Commissioner may refuse permission if any steam-boiler in the proposed position is objectionable. He may determine the height of the chimney of any steam-boiler. He may grant permission under such restrictions and regulations as he thinks fit. As I have already mentioned, this power on the part of the Commissioner is not inconsistent with the powers conferred on the company under the license granted to the company under the Electricity Act.

In this connection, I think it is also relevant to consider that, if we allow the contention raised by the Electric Company, it would follow that several other provisions of the City Municipal Act would not be applicable to them at all. There are provisions relating to buildings contained in Ss. 232, 235, 243 and 245 of the Act, and with reference to some of them similar questions have arisen in England and Courts have there held that such companies are bound by similar provisions relating to build-

6. (1909) I.L.R. 34 B. 252. 18. (1913) I.L.R. 38 B. 565.

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ings. In the absence of more definite provisions in the Electricity Act, I do not see any reason for adopting a construction of the Act which will make many of the salutary provisions designed for public safety and benefit practically a dead letter with reference to such companies, if the company's contention be upheld.

Finally, it was argued that the existence of two authorities on a particular matter is always irksome and would lead to friction and that such a position should not be accepted unless the Act compels us to do so. Here again, certain English authorities have been cited to us where not merely *two*, but even *three*, authorities were held entitled to enforce their respective supervision with reference to works carried on by companies like the Electric Company before us. It is not necessary for me to refer at length to those cases here. All that I am now concerned to say is that the existence of two or even more authorities is not by itself conclusive in favour of the contention raised by the learned advocate for the respondent. In my view, various powers conferred upon public authorities are conferred for the purpose of enabling them to see that certain aspect of public health, safety, convenience, etc., are not interfered with or ignored by persons proceeding under special Acts. I think therefore that the mere existence of supervision on the part of the authorities does not by itself necessitate the view suggested by the learned advocate for the respondent.

For these reasons, I think that the provisions of section 288 of the City Municipal Act are not inconsistent with either the Electricity Act, or with the provisions of the license granted to the respondent to which our attention was drawn; and it follows that the Electric Company is bound by the provisions of that section. I agree with the form of decree proposed by my learned brother.

Appellant's advocate's fee will be fixed at Rs. 250 in each appeal, having regard to the nature of the questions involved in these cases.

S.R. *Appeals allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD BLANESBURGH, LORD MACMILLAN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

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Abdul Ghafur v. Hussain Bibi.

Abdul Ghafur and others .. *Appellants**

v.

Hussain Bibi and others .. *Respondents.*

Evidence Act (I of 1872), S 32 (6)—Proof of pedigree—Statements of deceased members of family—Admissibility—Mirasi—Evidence of—Value of

The statements of deceased members of the family made *ante litem motam* are evidence to prove pedigree under S 32 (6) of the Evidence Act, 1872. And such statements by deceased members may be proved not only by showing that they actually made the statements, but by showing that they acted upon them or assented to them or did anything that amounted to showing that they recognised them Observations of Lord Blackburn in *Sturla* v. *Freccia,* (1880) 5 A C 623 at 641, relied on.

It is the business of a *mirasi* who is a hereditary family bard to acquaint himself with the details of family history and the fact that he must speak from hearsay does not render his evidence valueless

Held, on the evidence, the plaintiffs-appellants had established their collateral relationship to the deceased.

Judgment of the High Court, Lahore, reversed.

Appeal No 9 of 1929 from a judgment and decree of the High Court, Lahore, dated the 27th April, 1925, reversing a judgment and decree of the Senior Sub-Judge, Gujranwalla, dated the 23rd May, 1921.

The principal point for determination on the present appeal was whether the plaintiffs-appellants had proved their relationship to the deceased and their right to succeed to the property in suit in preference over the respondents (sisters and sister's issue of the deceased) either by custom or by Muhammadan Law.

Narasimham and *Zafarullah Khan* for appellants.

The respondents were not represented at the hearing.

16th December, 1930. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—The plaintiffs in this suit, now the appellants, sue for possession of certain properties described in their plaint, which formerly belonged to the deceased Saleh-ud-Din and which they claim by right of succession. In order that their claim may succeed they have to establish two things: (1) that they are collaterals of the deceased, and (2) that the deceased's succession was governed by customary law. The

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present respondents are two sisters and the children of a deceased sister of the late Saleh-ud-Din. They deny that the appellants were in any way related to the deceased and maintain that Muhammadan Law alone governs the succession to the properties in question.

The Senior Sub-Judge at Gujranwala, before whom the matter came in the first instance, decided both of the two issues above mentioned in favour of the appellants, for whom he accordingly gave judgment. On appeal, the High Court of Judicature at Lahore (Martineau and Zafar Ali, JJ.) reversed this decision, holding that the appellants had failed to prove that they were collaterals of the deceased and finding it unnecessary to proceed to the consideration of the second topic. Hence the present appeal.

The respondents lodged a case which was before their Lordships, but did not appear in support of it. The appeal was accordingly heard *ex parte* but counsel for the appellants very properly brought to their Lordships' notice the whole material evidence in the case.

The main question and the one on which the Senior Sub-Judge and the High Court are at variance relates to the pedigree of the parties. The ancestor whom the appellants assert to be common to them and to the deceased Saleh-ud-Din is one Mohammad Muslim, grandson of Qazi Rahim-ud-Din. They claim that they are descended from one of the sons of Mohammad Muslim and that the deceased was a descendant of his other son. As the descents are traced through several generations in each branch, it is manifest that matters of family history not susceptible of direct proof are involved.

In approaching a pedigree problem of this nature, their Lordships think it well to recall the words of Lord Blackburn in *Sturla* v. *Freccia*[1]:—

"It has been established for a long while that in questions of pedigree,—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice,—but for whatever reason, the statement of deceased members of the family made *ante litem motam,* before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances."

1. (1880) 5 A.C. 623 at 641.

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The rule of evidence thus enunciated is in accord with the terms of S. 32 (6) of the Indian Evidence Act, 1872, which is applicable to the present case.

Now it is fortunate for the appellants that in each of the two families which they seek to connect—their own and that of the deceased—there was an enthusiastic genealogist much interested in domestic annals and achievements. On the side of the deceased there was his grandfather's brother, Shah Nawaz Din, who in 1875, compiled a very elaborate genealogical tree and appended to it a series of biographical notes, obviously the result of prolonged investigation and research. He died some twenty-eight years ago. If this document is authentic and reliable, it establishes the appellants' case. It answers the above test of admissibility for it is a statement of a deceased member of the family, and was prepared long before the emergence of the present controversy. It is stated to have been "produced by a witness for the plaintiff on the 4th June, 1920." Two witnesses were examined for the plaintiffs on that date, and it does not appear which of them actually produced the document, but both of these witnesses are among the plaintiffs and so are members of the family to whose history the document purports to relate. Though apparently not formally produced until 4th June, 1920, it was put to other witnesses examined for the plaintiffs on earlier dates. A convenient extract from the genealogical tree embodying the portion of it material to the present case is appended by the Senior Sub-Judge to his judgment.

The appellants' family, as has been said, also included a member interested in genealogy in the person of Ghulam Hussain, father of four of the plaintiffs and related in various degrees to the other plaintiffs. There is produced a long document to which has been given the title "Historical facts pertaining to the pedigree table of Muhammad Shahnawaz-ud-Din," and which appears to be largely a transcript of an expanded version of the biographical notes appended by Shah Nawaz Din to his genealogical tree. This document bears to be signed by Abdul Qadir, one of the plaintiffs, "nephew of Maulvi Ghulam Hussain, deceased, compiler of this pedigree table (in his own hand in Persian characters)."

It is proved by the evidence of Ali Gauhar, a witness 70 years of age called for the plaintiffs, that the first document, consisting of the genealogical tree and biographical notes, is in the handwriting of Shah Nawaz Din with the exception of a few

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names of descendants subsequently added to the tree in another hand and by the evidence of the same witness that the second document, consisting of the historical facts, etc., is in the handwriting of Ghulam Hussain. The significance of this for the present purpose is obvious, for it demonstrates that in each of the two families which the plaintiffs seek to connect, there was a common tradition and that there was agreement between them, vouched in the case of each branch by a document under the hand of a deceased member of that branch, on the material facts of their common ancestry.

Their Lordships regard this concurrence of family records as constituting by itself important evidence in support of the appellants' submission. But there is also a considerable body of oral testimony in their favour. Mohammad Qasim, who has apparently married into the appellants' branch, was acquainted with the family annalist, Shah Nawaz Din, who was of the deceased's branch, and deposes to the collateral relationship. Barkat Ali states that he is related to and knew both Shah Nawaz Din and his brother and that the plaintiffs are their collaterals through their common ancestor Mohammad Muslim. Mohammad Haidar also knew both Shah Nawaz Din and his brother who, he says, were his collaterals and also collaterals of the plaintiffs through their common descent from Mohammad Muslim. Muzaffar Ali's evidence is to the same effect. Ali Gauhar, the witness mentioned above, says that Ghulam Hussain and Shah Nawaz Din stated before him that they were collaterals. There is further supporting testimony of witnesses acquainted with both branches, which it is unnecessary to detail.

As against this substantial body of evidence, oral and documentary, the defendants content themselves with adducing two or three witnesses who merely deny the existence of the alleged collateral relationship and say they never heard it asserted by members with whom they were acquainted of either branch.

A special point, however, is taken by the defence. It is common ground that the deceased's family were Qureshis by caste, while one of the defendants' witnesses says that Amir Ahmad, one of the plaintiffs, is Khokhar by caste and another says that "Amir Ahmad gives his caste as Khokhar." The term "caste" is inaccurately used but apparently if the plaintiffs were Khokhars and not Qureshis, this would be inconsistent with their being related collaterally to the deceased's branch. There is, however, positive evidence that the plaintiffs are Qureshis and while it appears that the plaintiff Amir Ahmad's son, who

is employed in the Forest Department, is entered in their books as Khokhar, there is a statement by Amir Ahmad that this entry is not correct and that his son is Qureshi. There is no allegation in the defendants' pleadings that the plaintiffs are Khokhars and so cannot be collaterals of the deceased's family, and in any event their Lordships are satisfied that the point has not been established against the plaintiffs.

The question of the relationship of the parties into which, in view of the divergence of opinion in the Courts below, their Lordships have thus thought it right to enter at some length is briefly disposed of by the Senior Sub-Judge who is content to find for the plaintiffs on the oral evidence, the two documents to which allusion has been made above and a guardianship petition by Makbul Hussain, brother-in-law of Saleh-ud-Din, in 1904, in which he states *inter alia* that Shah Din, said to be the person of that name shown in the pedigree of the appellants' branch, was a relative of Saleh-ud-Din.

In the High Court, the pedigree table is rejected as unsatisfactory evidence, first because some of the plaintiffs' witnesses said that it was in the handwriting of Shah Nawaz Din, whereas the whole of it could not be in his handwriting as it contains an entry of his own death and entries of the names of persons who were born after his death, but this was put right by the subsequent witness Ali Gauhar. In the second place, the learned Judges of the High Court point out, what is true, that the genealogical tree is largely based on hearsay, but this circumstance does not vitiate pedigree evidence, as their Lordships have already stated. In particular, the High Court Judges discount on this ground the evidence of Allah Ditta, thirty-five years of age, who was the *mirasi* of Shah Nawaz Din and his brother. But it is the business of a *mirasi*, who is a hereditary family bard, to acquaint himself with the details of the family history, whose glories he recounts in song on ceremonial occasions, and the fact that he must speak from hearsay does not render his evidence valueless. A point is also made by the learned Judges of an alleged discrepancy in the identification of the Shah Din mentioned in Makbul Hussain's petition with the Shah Din entered in the pedigree of the appellants' branch of the family, but this may well have arisen from the peculiar method of reckoning the degrees of relationship which obtains in this part of India and in any event, their Lordships do not find it necessary to rely on the evidence of Makbul Hussain's petition. A further discrepancy arising from the mention of Saleh-ud-Din's grand-

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father in a sale deed as being the grandson of Wali, not Mulla, Mohammad, appears to their Lordships quite unimportant, even if it is a misnomer, which is not certain, for Wali may be a descriptive title and may have been used of Mulla Mohammad.

Upon the whole matter, their Lordships find that the criticisms of the High Court on the evidence for the plaintiffs are insufficient to displace its value and cogency and they agree with the Senior Sub-Judge that the plaintiffs have satisfactorily established their collateral relationship to the deceased Saleh-ud-Din.

The second point in the case, as to the law applicable to the deceased's succession, is not discussed by the High Court. Their Lordships find in the evidence for the plaintiffs sufficient proof derived from several past instances that customary and not Muhammadan Law governs succession in the family of the deceased and in this they agree with the conclusion of the Senior Sub-Judge. Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed, the judgment of the High Court, dated 27th April, 1925, recalled, and the decree of the Senior Sub-Judge of 23rd May, 1921, restored. The appellants will be found entitled to their costs here and below.

Solicitors for appellants: *Douglas, Grant & Dold.*

K.J.R.|S.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

In the matter of the Indian Legal Practitioners Act (XVIII of 1879), S. 7 and the Rules framed under the Act.

U. Gopala Menon .. *Petitioner.**

In re Gopala Menon.

Legal Practitioners Act (XVIII of 1879), S. 7—Rules framed under Act, R. 13—Renewal of certificate—Application by practitioner to High Court—Order of District Judge forbidding practice pending receipt of renewed certificate—Legality.

The High Court has not delegated to District Judges the power to suspend practitioners pending the receipt of their renewed certificates Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court.

Where a District Judge passed an order forbidding a legal practitioner to practise pending the receipt from the High Court of his renewed certificate,

Held, that the order was illegal and should be cancelled.

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*C.M.P. No. 531 of 1931. 10th February, 1931.

In re Gopala Menon.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to permit the petitioner herein to practise as a pleader in the District Court of South Malabar and in other Courts to which his certificate of pleadership extends, pending final orders of the High Court on his application for the renewal of his certificate for the year 1931, and to cancel the order of the said District Court of South Malabar, dated 21st January, 1931 and made in his proceedings D. No. 134-A of 1931.

S. Duraiswami Aiyar and *P. Govinda Menon* for petitioner.

The Advocate-General (A. Krishnaswami Aiyar) amicus curiae.

The Court made the following

ORDER.—This is a petition from a legal practitioner practising in the Court of the District Judge of South Malabar to set aside the order of the District Judge, dated 21st January, 1931, forbidding him to practise pending the receipt from the High Court of his renewed certificate. The petitioner held a certificate for the year 1930 which was to hold good till December 31, 1930. Under S. 7 of the Legal Practitioners Act

"at the expiration of such period the holder of the certificate if he desires to continue to practise, shall, subject to any rules consistent with this Act which may, from time to time, be made by the High Court in this behalf, be entitled to have his certificate renewed by the Judge of the District Court, etc."

The only rule framed in this connection is Rule 13 which provides that pending the receipt of the renewed certificate practitioners may continue to practise subject to such precautions as to identification as the District Judge may think fit to prescribe. It is therefore clear that the High Court has not delegated to District Judges the power to suspend practitioners pending the receipt of their renewed certificates. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court. In the circumstances, the order of the learned District Judge cannot be supported and is cancelled.

With this view the learned Advocate-General agrees.

B.V.V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Subramania Aiyar (died) and others .. *Appellants**
(*1st Deft. and his L.Rs.*)

v.

Srila Sri Vaithilinga Pandara Sannadhi .. *Respondent*
(*2nd Plff.*).

Subramania Aiyar v. Vaithilinga Pandara Sannadhi.

*Trust—Gross negligence of trustee—*Ex parte *decree passed against temple—Suit by succeeding trustee to establish rights of temple—Adjudication in prior suit whether operates as* res judicata

Where in a prior suit the trustee of a temple omitted to put forward a very valid defence on behalf of the temple with the result that an *ex parte* decree was passed and the succeeding trustee filed a fresh suit to establish the rights of the temple in respect of the very same properties which formed the subject-matter of adjudication in the earlier suit,

Held, that the decree passed in the prior suit, being the result of gross negligence on the part of the then trustee, did not operate as *res judicata* so as to bar the later suit.

Dada Sahib v. *Gajaraj Singh,* (1924) 47 M.L.J. 928, applied

Appeal against the decree of the Court of the Subordinate Judge of Negapatam in A.S. No. 149 of 1925 (A.S. No. 153 of 1925 on the file of the District Court of East Tanjore) preferred against the decree of the Court of the District Munsif of Tiruvalur in O.S. No. 388 of 1924 (O.S. No. 198 of 1923 on the file of the Court of the District Munsif of Nannilam, O.S. No. 295 of 1922 on the file of the Court of the Additional District Munsif of Tiruvalur).

T. K. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for appellants.

K. Srirangachariar and *S. Panchanada Mudaliar* for respondent.

The Court delivered the following

JUDGMENT.—The legal representatives of the 1st defendant are the appellants. The suit properties originally belonged to one Ramaswami Aiyar. After his death, his widow Anantammal became entitled to the properties. She had three daughters, Muthammal, Chinnammal and Narayani Ammal, one of whom, Narayani Ammal, the mother of the 2nd defendant, predeceased Anantammal. As a result of a family settlement the two surviving daughters surrendered their life-estate to defendants 1 and 2 and to Ramaswami Aiyar, the deceased brother

*Second Appeal No. 580 of 1927. 8th October, 1930.

of the 1st defendant. Ramaswami Aiyar and Subramania Aiyar are the children of Chinnammal. In 1891 the two daughters of the propositus Ramaswami Aiyar and the 2nd defendant and Ramaswami Aiyar for himself and as guardian of his brother, the present 1st defendant, executed Ex. C in favour of the plaint temple in respect of the suit property. The temple had been enjoying the property from that date till it was dispossessed in 1921 as a result of a decree obtained by the present 1st defendant in O.S. No. 550 of 1920.

The suit out of which this Second Appeal arises was instituted for the recovery and possession of the plaint property with mesne profits. The 2nd plaintiff, the present trustee of the temple, was originally the 3rd defendant but was transposed by an order of the Court as the 2nd plaintiff. The contesting defendant was the 1st defendant. Various issues were framed in the case but the only issue arising for consideration in this second appeal is issue No. 4, namely, whether the suit is barred by *res judicata* by reason of the decision in O.S. No. 550 of 1920 of the District Munsif's Court, Tiruvalur. The Lower Courts found this issue in favour of the plaintiffs and passed a decree for possession and mesne profits in favour of the plaint temple represented by the 2nd plaintiff.

In O.S. No. 550 of 1920 the present 1st defendant instituted the suit to recover possession of the plaint property. The then trustee of the plaint temple was impleaded as a defendant in that suit. He allowed an *ex parte* decree to be passed in favour of the 1st defendant and the plaintiff in that suit. The question for consideration is whether that *ex parte* decree would operate as *res judicata* against the plaintiffs in this suit. It is clear from the evidence in the case that the plaint property belonged to the temple at the time of that suit. Under Ex. C the property was gifted to the temple by all the persons who had title to it. So far as the present 1st defendant was concerned he was represented by his brother. O.S. No. 550 of 1920 was instituted by the present 1st defendant long after he had attained majority and after his claim had become barred by limitation under Art. 44. The temple had also perfected its title by adverse possession before the date of that suit. From these circumstances it is clear that the temple had a very valid defence in that suit but the then trustee did not file any written statement nor did he conduct the suit. After the *ex parte* decree he put in an application to set it aside. That was dismissed and the appeal filed against that order was also dismissed.

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From these circumstances both the Lower Courts have come to the conclusion that the conduct of the trustee in not defending the suit amounted to gross negligence. This finding of the Lower Courts which is amply justified by the circumstances of the case has not been questioned before me.

The question is whether a decree allowed to be passed against a temple on account of the gross negligence on the part of the then trustee in not putting forward a valid defence which he could have put forward, is binding on the succeeding trustee. No authority directly bearing on the question has been brought to my notice. In *Dada Sahib* v. *Gajaraj Singh*[1] it was held by Devadoss, J., that if a guardian of a minor is guilty of gross negligence in conducting the suit on behalf of the minor the decree passed in that suit will not be binding on the minor. The learned Judge says:

> "It is not every kind of negligence that would be a sufficient ground for setting aside a decree or for declaring that the proceedings in Court are null and void; but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor, which would not have been otherwise decreed against him, it must be held that the guardian's negligence contributed to the Court proceeding in the manner it did."

As already stated, it is clear that if the then trustee had defended O.S. No. 550 of 1920, no decree would have been passed in it against the temple. On principle I do not see any reason why an idol of a temple should not be treated in the same manner as a minor with respect to the gross negligence on the part of the trustee in not defending the suit, the trustee representing its interests just in the same way as the guardian represents the interests of the minor. An idol can act only through the trustee of the temple. As Mr. Muthukrishna Aiyar has pointed out, it is possible in certain respects to distinguish the position of a trustee representing an idol from the position of a guardian of a minor but on broad principle I cannot find any satisfactory ground for treating the case of a trustee representing an idol in a suit differently from the case of a guardian representing a minor. In *Vadlamudi Sastrulu* v. *Thalluri Venkataseshayya*[2] the learned Judges assumed without deciding the question that the idol is in the position of a minor but held that there was no negligence in the course of the previous litigation in that case. In the absence of specific authority on the point I am inclined to hold that the principle underlying

1. (1924) 47 M.L.J. 928. 2. A.I.R. 1928 M. 614.

the decision in *Dada Sahib* v. *Gajaraj Singh*[1] may well be applied to the facts of the present case and I would therefore hold that the decision in O.S. No. 550 of 1920 would not operate as *res judicata* in the present suit.

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In the result, the second appeal fails. In the circumstances each party will bear its own costs in the second appeal.

B.V.V. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD TOMLIN, LORD MACMILLAN, SIR JOHN WALLIS, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Dawood Hashim Esoof and another (substituted for the Official Liquidator) .. *Appellants**

v.

C. Tuck Shein (substituted for Leon Shain Sway) .. *Respondent.*

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Dawood Hashim Esoof v. Tuck Shein

Riparian rights—Tidal stream—Public right of navigation—Extent of—Public right to land on the banks, how acquired—Obstruction of free access from channel to complainant's land—Conditions for cause of action—Evidence of a public waterway—Small tidal creek.

Under the English Law, the bed of a tidal stream which is vested in the Crown and over which all subjects of the Crown have a right of navigation is confined to the space covered by "ordinary" high tides, that is, the mean between spring and neap tides—or in other words, to that part of the shore which, for the most part of the year, is reached and covered by the tides. *Attorney-General* v. *Chambers*, (1854) 4 De Gex M. & G. 206, 43 E.R. 486, referred to.

That principle is equally applicable to India, where the beds of tidal waters are the property of the Government in right of the Crown and the public right of navigation is only co-extensive with the right of the Government in the bed. *The Secretary of State* v. *Kadirikutti*, (1890) I.L.R. 13 Mad. 369, referred to. But apart among any right which may be established by custom or prescription and the rights of riparian owners on the banks of tidal navigable waters which arise *jure naturae* by virtue of the contiguity of the land with the flow of the stream, the public right of navigation does not include the right to land upon or to take merchandise on or over the banks of the stream. The banks above the "ordinary" high-water mark remain private property unaffected by the waterway.

A person who complains of obstruction of free access from a channel to his land at some distance thereto must prove not merely that there is a public waterway but that the waterway comes right up to his land.

A tidal creek is not necessarily a public waterway, especially when it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time and by very small boats. *R.* v. *Montague*, (1825)

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*P.C. Appeal No. 4 of 1928. 19th January, 1931.

1. (1924) 47 M.L.J. 928.

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4 B. & C. 598: 107 E.R. 1183 and *Swi E Bak* v. *Ang Yong Huat,* (1923) A.C. 429, approved.

Held, the creek in suit, which was dry for most of the time and only for five to ten days in each month contained enough water to float small logs of wood, was not shown to be a public waterway.

Judgment of the High Court, Rangoon, reversed.

Appeal No. 4 of 1928 from a judgment and decree of the High Court, Rangoon, dated the 24th March, 1925, reversing a judgment and decree of the trial Judge on the Original Side of that Court, dated the 8th July, 1924.

The material facts of the case are set out sufficiently fully in their Lordships' judgment.

Dunne, K.C. and *Robert Leach* for appellants.

De Gruyther, K.C. and *Pennell* for respondent.

19th January, 1931. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The parties to this appeal are the owners of rival saw-mills on or adjacent to the northern end of a tidal creek communicating to the south with the Rangoon River, through which the tide flows into the creek. The value of the creek is as a means of floating logs up from the river to the mills.

The appellants are admittedly the owners under grant from the Government of the soil of this part of the creek, which extends for about 200 feet to the north of the Strand Road. They are also the owners of land on the north and east sides of it. Their predecessors-in-title had reclaimed a considerable portion on the east, and at the time when the suit out of which this appeal arises was instituted, only a narrow strip from 40 to 50 feet wide was left to which the tide had access.

It will be convenient to refer to the part of the creek to the north of the Strand Road, with which alone the dispute is concerned, as the upper creek.

The Strand Road crosses the creek by a bridge, and immediately below it is a second bridge carrying the railway. The head-way under both these bridges is limited, being only 2·88 ft. above ordinary spring tides under the Strand Road bridge, and a little more in the case of the railway bridge, but this is admittedly sufficient for the passage of logs and small boats.

The respondent's saw-mill was erected in 1922 on the west side of the upper creek by his predecessor-in-title, who constructed in connection with it on his own land a timber pond, into which he proposed to float his logs by an entrance cut into the upper creek. To this the predecessors of the appellants

objected, and they planted a row of piles opposite this entrance, which effectually blocked the passage of the respondent's logs. The predecessor of the respondent then instituted his suit on the Original Side of the Rangoon High Court, praying for an injunction and damages.

The parties to the present appeal are transferees from the original plaintiff and defendant, but nothing turns on the devolution of their rights, and for the purposes of this judgment the respondent will be regarded as the plaintiff and the appellants as the defendant.

The case made in the plaint was that the upper creek was a public waterway through which the respondent, as a member of the public, had the right to float logs to his pond. By paras. 6 and 7 of the plaint it was also alleged that since 1905 he had been floating logs and bringing them to his mill on the western bank. If this was intended to be a claim to a separate right by way of easement, it is clear that it must fail, inasmuch as the suit having been instituted in 1923, the right was not alleged to have been exercised for 20 years before suit (*see* section 26 of the Limitation Act, 1908), and no claim as an easement has been maintained before their Lordships.

The appellants denied the claim and asserted that the upper creek was their private canal over which the respondent had no rights, but before the Board it was admitted that the so-called "canal" was all that then remained of what had been the top of the creek prior to the reclamation on the east.

It is not disputed that the upper creek is tidal "in the sense that at certain periods of the month the tide reaches its most remote point; but for most of the time it is dry, at any rate above the Strand Bridge, except for a trickle of water making its way back to the river. For a few hours at high tide on five to ten days in each month there is enough water in the creek to float ordinary teak logs, 3 feet in diameter, the whole length of the creek; in the middle of the creek the water is then well over a man's height."

This quotation is from para. 5 of the printed case of the respondent, and may be taken to reproduce the result of the evidence which was given at the hearing.

The Trial Judge held that though the upper creek was tidal to the extent stated above, it had not been established that it was a public waterway, and he dismissed the suit. In the Court of Appeal this decision was reversed, and a decree was passed in the respondent's favour ordering the removal of the piles and

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restraining the appellants from continuing or repeating the obstruction. It is not, their Lordships think, very clear upon what ground the judgment of the Appeal Court was rested. They do not in terms, at all events, find that the upper creek was a public waterway, and in certain review proceedings taken by the appellants the learned Judges expressly disclaimed any intention so to hold. Their conclusion is as follows:—

"At high tide water continues to flow right up to respondent's slipway, and in sufficient quantity to enable logs to be floated up, and the right of floating up logs has been exercised for a great many years by all those who had occasion to use it for this purpose. That right had never ceased to exist; the water had never ceased to exist, and plaintiff (the present respondent) is as much entitled to float his logs up to-day as he was when he had a mill on the eastern bank."

The plaintiff's "mill on the eastern bank" to which reference is here made was on the land immediately to the east of the upper creek, which the original plaintiff rented from one Sheobax, the then owner, for five years between 1895 and 1901. He then became insolvent and the mill was sold by the official assignee. It and the land upon which it stood, including the bed of the creek, are now admittedly the property of the appellants, and their Lordships fail to understand how the plaintiff's temporary occupation between 1895 and 1901 could give him any right of user in the absence of proof that the waterway was public.

Their Lordships, therefore, think that the case must be decided solely upon the question of a public waterway. The line of piles forming the alleged obstruction is admittedly upon the appellants' property, and unless they interfere with a public waterway the respondent can have no cause of action for their removal, and he must in effect show that the water right up to the bank of his land, the access to which is blocked by the appellants' piles, is part of the public waterway. Their Lordships doubt if this aspect of the case was presented to the Courts in India.

Under the English law there can be no doubt that the bed of a tidal creek, which is vested in the Crown, and over which all subjects of the Crown have a right of navigation, is confined to the space covered by "ordinary" high tides, that is, the mean between spring and neap tides—or in other words, to that part of the shore which for four days in every week, or for the most part of the year, is reached and covered by the tides: *Attorney-General* v. *Chambers.*[1]

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1. (1854) 4 De Gex M. & G. 206: 43 E. R. 486.

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In India it has long been recognised that the beds or channels of tidal navigable waters are the property of the Government in right of the Crown: *Doe d. Seebkristo* v. *East India Co.*[2], *Gureeb Hussein* v. *Lamb*[3], *Lopez* v *Muddun Mohun Thakoor*[4], *Nogender Chunder Ghose* v. *Mahomed Esof*[5], *Baban Mayacha* v. *Nagu Shravucha*[6] and *Srinath Roy* v. *Dinabandhu Sen.*[7] The only reported case in India (so far as their Lordships have been able to discover) in which reference is made to the *extent* of the channel or bed so vested in the Government is *The Secretary of State* v. *Kadirikutti*,[8] in which the doctrine of *Attorney-General* v. *Chambers*[1] was held applicable. The principle of the English rule is stated by Lord Cranworth to be that it is only within these limits that the bed can be regarded as in the nature of unappropriated soil, not capable of ordinary cultivation and occupation. Their Lordships think that this principle is equally applicable to Indian waters, and that the same rule should be applied. The public right of navigation or waterway can only be co-extensive with the right of the Crown or the Government in the bed, and their Lordships are therefore of opinion that the right claimed by the respondent in the present case over the creek cannot extend beyond the limits of "ordinary" high tides in the sense defined above. It is clear, however, that as the upper creek is only navigable for a few hours at most on from five to ten days in the month, the whole of it cannot possibly be a public waterway. Indeed, their Lordships doubt whether "ordinary" high tides rise beyond the Strand Bridge at all A table showing the maximum depth of water under the bridge during portions of the months of January, May and September, 1924, has been proved in the case, and it appears from this that the upper creek must have been wholly dry during a considerable portion of each month—"for most of the time" according to the paragraph quoted in an earlier part of this judgment from the respondent's case.

The respondent's real complaint is not of an obstruction to the channel generally, but of something which obstructs free access from the channel to his land on the west. In order to make good this complaint he must prove not merely that there is a public waterway over some part of the upper creek, but that

1. (1854) 4 De Gex M. & G. 206: 43 E.R. 486
2 (1856) 6 Moo. I.A. 267
3. (1859) Cal. S.D.R 1357
4. (1870) 13 Moo. I.A. 467.
5. (1872) 10 Beng. L.R. 406
6. (1876) I.L.R. 2 Bom 19.
7 (1914) L.R. 41 I.A. 221: I.L.R. 42 C. 489: 27 M.L.J. 419 (P.C.).
8. (1890) I.L.R. 13 M. 369.

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the waterway comes right up to his land. The public right to use the waterway would not imply the right to land upon, or to take merchandise on, to or over immediately adjacent land in private ownership. Such a right may no doubt be established by custom or prescription, as for instance in the case of a right of towage (*Ball* v. *Herbert*[9]), but the banks above the "ordinary" high-water mark remain private property unaffected by the waterway. The rights of riparian owners on the banks of tidal navigable waters exist *jure naturae,* because the land has by nature the advantage of being washed by the stream, but it is essential to the existence of this right that the land should be in contact with the flow of the stream at least at the times of "ordinary" high tides: see *Lyon* v. *Fishmongers' Co.*[10]

Unless, therefore, the respondent establishes that a public waterway abuts on his land, his suit must fail.

A plan prepared in 1896-7 shows that at that time a considerable strip of dry land, forming part of what is now the appellants' property, intervened between the upper creek and the site of the alleged obstruction. Since that time erosion of the western shore, possibly due to the reclamation on the east, has brought the highest water limit to the respondent's land, but there has been no attempt to show that it is washed by "ordinary" high tides so as to be in contact with a public waterway, and their Lordships for the reasons already given think that this is most improbable.

Certain other contentions advanced on behalf of the respondent remain to be considered.

It was suggested in the first place that though at the time of suit the upper creek may have been dry for a considerable portion of every month, this was due to silting up, or perhaps to the reclamation on the east side, and that if it was at one time, as the respondent contended it was, a public waterway, no lapse of time would deprive it of that character. Their Lordships think it sufficient to say that in their opinion it is not established that the upper creek was at any time a public waterway, and this was the finding of the Trial Judge.

Reliance was placed upon the former user by boats, and the alleged user by the predecessor of the respondent for floating logs to his old mill on the west bank between 1905 and 1914. It appears that prior to 1906 there were a number of huts, said to have been inhabited by beggars, on the land to the north of the

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9. (1789) 3 T.R. 262: 100 E.R. 564.
10. (1876) 1 A.C. 662.

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upper creek, and that the inhabitants used it for the passage of boats to the Rangoon River whenever the water was of sufficient depth. In 1906 the land on which the huts stood was acquired by the Tramway Company: the huts were removed and from that time onward the boat traffic ceased. The Trial Judge was satisfied that the evidence as to these boats was true, but he held, following the authority of *R.* v. *Montague*[11], that this was not sufficient to establish the claim to a public waterway.

Their Lordships think that the learned Judge was right. *R.* v. *Montague*[11] was approved by this Board in a case from the Straits Settlements (*Sim E Bak* v. *Ang Yong Huat*[12]), and there seems to be no reason why the doctrine laid down by Bayley, J., should not be applicable to India, for if, as was held in that case, a tidal water is "a petty stream, navigable only at certain periods of the tide, and then only for a very short time and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." Their Lordships think that this description applies closely to the upper creek and to the class of navigation proved in the present case.

With reference to the alleged floating of logs to a former mill of the respondent's predecessor between 1905 and 1914, it is only necessary to say that the Trial Judge held it not proved, and their Lordships see no reason to disagree with him.

The last matter that calls for consideration is a decree of the Recorder's Court in Rangoon, dated the 18th May, 1897. A suit had been instituted by the predecessor-in-title of the respondent against one MacGregor, who had a mill at the mouth of the creek where it leaves the Rangoon River. The complaint was that MacGregor had obstructed the floating of a mill-boiler from the river into the creek, and the decree declared that the creek was a public waterway. It is clear, their Lordships think, that this dispute concerned only the creek below the bridges, and had nothing to do with the upper creek. In their Lordships' view this decree, if relevant at all to the matter of this appeal, can afford no help to its decision.

Their Lordships would also observe that none of the contentions dealt with in the latter part of this judgment can avail the respondent to establish that he has by reason of his riparian ownership a right of access, which the appellant has obstructed, to any public waterway existing in the upper creek.

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11. (1825) 4 B. & C. 589: 107 E.R. 1183.
12. (1923) A.C. 429.

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For the reasons given their Lordships think that the decree of the Appeal Court in Rangoon, dated the 24th March, 1925, should be set aside, and that of the Trial Judge, dated the 8th July, 1924, should be restored, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of the appellant in the Appeal Court in Rangoon and before this Board.

Solicitors for appellants: *Cutler, Allingham and Ford.*

Solicitor for respondent: *J. E. Lambert.*

K.J.R.|S.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Appu L. Rm. Lakshmanan Chetti (died) and another .. *Petitioners and Appellants* in Second Appeal (Plaintiff and L.R. of Plaintiff)*

v.

The Union Board of Devakottai through its President, U. Rm. M. Ch. M. Manickavasagam Chetti .. *Respondent in both (Defendant).*

Lakshmanan Chetti v. The Union Board of Devakottai.

Madras Local Boards Act (XIV of 1920), S 225—Applicability—Suit for declaration that levy of profession tax was illegal and for refund—Notice if necessary.

S. 225 of the Madras Local Boards Act, 1920, is applicable only to suits for compensation and for damages. A suit for a declaration that the defendant Union Board is not entitled to levy profession tax from the plaintiff and for recovery of the tax so collected is not a suit for compensation and for damages and therefore does not require notice under the section

Govinda Pillai v. *The Taluk Board, Kumbakonam,* (1908) I.L.R. 32 M 371: 19 M.L.J. 333 (F.B.), relied on.

Munir Khan v *The Municipal Board, Allahabad,* 1930 A.L J. 461: 122 I.C. 742, not followed.

Petition under section 115 of Act V of 1908 praying the High Court to revise, and Appeal against the decree of the Court of the Subordinate Judge of Devakottai in Appeal Suit No. 36 of 1926 (A.S. No. 401 of 1926 on the file of the District Court of Ramnad) preferred against the decree of the Court of the District Munsif of Devakottai in Original Suit No. 294 of 1925.

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*C.R.P. No. 1207 of 1927 and S.A. No. 2009 of 1927. 4th February, 1931.

M. S. Vaidyanatha Aiyar for petitioner.

K. Bhashyam Aiyangar for respondent.

The Court delivered the following

Lakshmanan Chetti v. The Union Board of Devakottai.

JUDGMENT.—The plaintiff is the petitioner. This Civil Revision Petition arises out of a suit instituted by the plaintiff against the defendant, the Union Board of Devakottah, for a declaration that the Board is not entitled to levy profession tax from him for the year 1924-25, that the assessment and the collection thereof are illegal and for the recovery of Rs. 100 paid by him with interest from the date of collection. The defendant amongst other things contended that the suit is not maintainable as no notice as required under section 225 of the Local Boards Act (XIV of 1920) was given by the plaintiff before the suit. The petitioner's contention with reference to this objection regarding the maintainability of the suit was twofold: (1) that the present suit does not fall within the scope of the section inasmuch as the section contemplates only suits for compensation and damages, and (2) that even if notice is required he has complied with this requirement as he had sent Ex. A to the President of the Union Board. Ex. A is described as an appeal petition to the President relating to profession tax. In the cover the sender is described as the petitioner in respect of the profession tax. The petition ends with the sentence, "I shall wait for one month and on the strength of this very registered petition I shall file a suit in the local District Munsif's Court." Ex. A was taken by the Union Board as an appeal preferred against the assessment made by the President.

The two points for decision arising from these contentions are: (1) whether a notice under S. 225 of Madras Act (XIV of 1920) is necessary in this case, and (2) if it is necessary, whether Ex. A would constitute a proper and valid notice under the section. On both these points both the Lower Courts decided against the petitioner. In the present Civil Revision Petition the validity of the decisions of the Lower Courts on both the points is questioned by the appellant.

Section 225, sub-cl. (1) of the Madras Local Boards Act (XIV of 1920) enacts that

"No action shall be brought against any Local Board, or against any member or servant of such Board, or against any person acting under the directions of such Board or of a member or servant of such Board, on account of any act done or purporting to be done in pursuance or execution or intended execution of this Act, in respect of any alleged neglect or default in the execution of this Act, until the expiration of two months next after notice in writing shall have been delivered or left either at the office of the Local Board or at the place of abode of such member or servant or of such

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person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intended plaintiff; and unless such notice be proved to have been so delivered or left, the Court shall find for the defendant."

It is contended on behalf of the petitioner that this section contemplates only suits for compensation and for damages against the Local Board and as the petitioner's suit which is one for refund of profession tax illegally levied is not a suit for compensation and damages at all, that section 225 does not apply to this case, and that therefore the notice required under the section is not necessary. In support of this argument reliance is placed mainly on three decisions of this Court in *Syed Ameer Sahib* v. *Venkatarama*,[1] *President of the Taluk Board, Sivaganga* v. *Narayanan*,[2] *Srinivasa* v. *Rathnasabapathi*[3] and *Govinda Pillai* v. *The Taluk Board, Kumbakonam*.[4] These decisions are no doubt under the old Local Boards Act and the old Madras District Municipalities Act; but a comparative study of the scope of the corresponding sections of the old and the present Local Boards Act and of the old District Municipalities Act, that is, section 156 of Act V of 1884, S. 225 of Act XIV of 1920 and S. 261 of Act IV of 1884 will show that the petitioner's contention is well founded. S. 156 of the Local Boards Act (V of 1884) (corresponding to section 225 of the present Local Boards Act) on which were based the two decisions in *Syed Ameer Sahib* v. *Venkatarama*[1] and *President of the Taluk Board, Sivaganga* v. *Narayanan*[2] so far as it is relevant for the present purpose is as follows:—

"No action shall be brought against any Local Board or panchayat or against any member or servant of such Board or panchayat or against any person acting under the directions of such Local Board or panchayat or of a member or servant of such Board or panchayat, on account of any act done or purporting to be done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act, until the expiration of one month next after notice in writing shall have been delivered or left either at the office of the Local Board or panchayat, or at the place of abode of such member or servant or of such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intended plaintiff; and unless such notice be proved to have been so delivered or left, the Court shall find for the defendant . . ."

In *Syed Ameer Sahib* v. *Venkatarama*[1] it was held that this section is only applicable to suits for compensation claimed for wrongful acts committed under the colour of the Act and was therefore not applicable to the suit in question which was one

1. (1892) I.L.R. 16 M. 296
2. (1892) I.L.R. 16 M 317: 3 M.L.J. 12.
3. (1892) I.L.R. 16 M. 474: 3 M.L.J. 124
4. (1908) I.L.R. 32 M 371: 19 M.L.J. 333 (F.B.)

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for ejectment brought on the ground that the land upon which the defendant had entered belonged to the plaintiff. In *President of the Taluk Board, Sivaganga* v. *Narayanan*[2] it was held that the cases contemplated in section 156 are suits for compensation and for damages and the principle is to allow public bodies time for tender of amends to the parties to avoid litigation. The latter observation regarding the tender of amends related to a provision embodied in the last sentence of that section which enacted that

"if the person to whom such notice of action is given shall before action brought tender sufficient amends to the plaintiff such plaintiff shall not recover more than the amount so tendered."

A similar provision is enacted also in clause (2) of section 225 of the present Act. In the case in question the learned Judge held that the principle of section 156 cannot apply "when the object of the suit is to obtain a declaration of title to immovable property and for an injunction to restrain interference with immovable property." The decision in *Srinivasa* v. *Rathnasabapathi*[3] was under S. 261 of the District Municipalities Act (IV of 1884) which corresponded generally with the necessary modifications to S. 156 of the Local Boards Act (V of 1884) in essential particulars. In this case it was held that "the cases contemplated under S. 261 are suits for compensation and for damages and the principle is to allow public bodies time for tender of amends to the parties so as to avoid litigation," and reference was made to *President of the Taluk Board, Sivaganga* v. *Narayanan*[2] already noticed and the cases quoted therein. These decisions would show that according to the law as it then stood, section 156 of the Local Boards Act and the similar provision contained in section 261 of the District Municipalities Act contemplated only suits for compensation and for damages. This position was made clear by the subsequent amendments introduced into the two Acts. The Local Boards Act (V of 1884) was amended by Act VI of 1900 which split up the section into four sub-clauses and added after the words "explicitly stating the cause of action" in the first clause the words "the nature and relief sought, the amount of compensation claimed." The other amendments need not be noticed. Section 261 of the District Municipalities Act (IV of 1884) had also by this time been amended in a similar way. The decision in *Govinda Pillai* v. *The Taluk Board, Kumbakonam*[4],

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2 (1892) I.L.R. 16 M. 317: 3 M.L.J. 12

3. (1892) I.L.R. 16 M. 474. 3 M.L.J. 124.

4. (1908) I.L.R. 32 M. 371. 19 M.L.J. 333 (F.B.).

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which is that of a Full Bench is under the amended section 156 (1) of the Madras Local Boards Act of 1884. Under that decision it was held that the amended section does not apply to suits for an injunction and the notice described therein is not necessary in the case of such suits. In support of their decision the learned Judges relied on the three decisions in I.L.R. 16 Madras already referred to and the amendment of S. 156 which introduced in it the words "the nature of the relief sought, the amount of compensation claimed." It is clear that in amending the Acts by introducing these words, the Legislature acted upon the decisions in I.L.R. 16 Madras which even without the amendment held that sections 156 and 261 would apply only to suits for compensation and for damages. Section 225 of the Local Boards Act (XIV of 1920), the section which applies to the present suit, so far as the present point is concerned, corresponds to the amended section 156 of the old Local Boards Act and enacts in similar language the same provisions which are contained in that section. It may well be said therefore as contended for by the petitioner's learned advocate that the Full Bench decision in *Govinda Pillai* v. *The Taluk Board, Kumbakonam*[4] may be used as an authority for interpreting the scope of section 225. Section 261 of the old District Municipalities Act is also similar to section 225 of the present Local Boards Act though that section has been thoroughly recast in the present District Municipalities Act. It appears to me that section 225 of the present Local Boards Act interpreted in the light of these decisions of which one is a Full Bench decision under the Local Boards Act shows clearly that that section would apply only to suits for compensation and for damages. These decisions were followed by Phillips, J., in *Municipal Council, Cochin* v. *Bavu Devussi*.[5] The petitioner has also relied on the decisions in *Municipal Council of Kumbakonam* v. *Veeraperumal Padayachi*[6] and *Krishna Jute and Cotton Mills Co., Ltd.* v. *Municipal Council, Vizianagram*[7] in support of his contention. I do not think it is necessary to discuss these cases as in my opinion the cases already discussed afford abundant authority in support of his contention. It is clear that the present suit which is for refund of profession tax that was illegally levied cannot be described as a suit for compensation and for damages and therefore it cannot be held on the authorities mentioned that it is not maintainable for want of notice prescribed under S. 225.

4. (1908) I.L.R. 32 M. 371: 19 M.L.J. 333 (F.B.).
5. A.I.R. 1926 Mad 235.
6. (1914) 28 M.L.J. 147.
7. (1925) 49 M.L.J. 542.

On behalf of the respondent Mr. Bhashyam Aiyangar argued that having regard to the decisions of this Court in *Municipal Council, Dindigul* v. *Bombay Co., Ltd.*[8] and of the Privy Council *Bhagchand Dagadusa* v. *The Secretary of State,*[9] it can no longer be maintained that the proposition of law laid down in the cases examined above to the effect that sections 156 and 156 (1) of the old Local Boards Act would apply only to suits for compensation and for damages is correct and that having regard to the comprehensive nature of the words used in section 225 it should be held that the section is applicable to all kinds of suits instituted against the Local Board whatever be their nature. I think this contention cannot be accepted. In *Municipal Council, Dindigul* v. *Bombay Co, Ltd.*[8] to which I was a party it was held that

"a suit by a company for the recovery of a sum wrongfully collected by a Municipality under section 92 is essentially an equitable action for 'money had and received' and not a suit for 'damages and compensation' and the bar of limitation prescribed by section 350, cl (2) of the Act will not apply to such an action."

This decision turned upon the scope of section 350 of the District Municipalities Act which in clause (1) stated

"No suit for damages or compensation shall be instituted against the Municipal Council . . . . ,"

and we had to consider whether the suit in that case could be described as a suit for damages or compensation. The words of cl. (1) of section 350 are totally different from the words of section 225 which we have to consider here and I fail to see how the decision in that case is in any way inconsistent with the decisions I have examined above. In the course of my judgment I contrasted the wording of section 261 of the old District Municipalities Act (IV of 1884) with the wording of section 350 and pointed out that "all descriptions of actions as under the English Law" would be included within the scope of section 261 of the old Act. This observation is relied on to show that according to this view, the opinion in the earlier decision that that section is confined only to suits for compensation and damages should be held to be incorrect. I do not think that this conclusion follows from my observation. In making this observation I was only pointing out that section 350 of the new District Municipalities Act (V of 1920) having regard to its wording was not so comprehensive in its scope as section 261 of the old Act which I think is perfectly correct; and that was all. I was

8 (1928) I.L.R. 52 M 207 · 56 M.L.J. 525

9. (1927) L.R. 54 I.A. 338: I.L.R. 51 B. 725: 53 M L.J. 81 (P.C.).

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not considering the question as to what kinds of suits will be included within the words "No action shall be brought, etc." used in section 261 of the old Act. In fact, none of the cases now brought to my notice on behalf of the petitioner was cited before us. In my opinion, the decision in *Municipal Council, Dindigul* v. *Bombay Co., Ltd.*[8] which, as I have already observed, is a decision under section 350 of the present District Municipalities Act, has hardly anything to do with the point which I have to decide in this case.

The decision in *Bhagchand Dagadusa* v. *Secretary of State*[9] deals with section 80, Civil Procedure Code, which states that

> "No suit shall be instituted against the Secretary of State for India in Council or against any officer for any act purporting to be done by such officer in his official capacity until the expiration of two months next after notice in writing given in the manner provided by the section."

Their Lordships held that the section applies to all forms of suits and whatever the relief sought including a suit for injunction. Though it may be said that there is a general similarity between the wording of section 80, Civil Procedure Code and that of cl. (1) of section 225 it has to be observed—and this is a very important circumstance—that the words "the nature of the relief sought, the amount of compensation, etc." which were introduced by the amendment in section 156 of Act IV of 1884 after the words "explicitly stating the cause of action" do not find a place in section 80, Civil Procedure Code. Even without these new words the learned Judges in *Syed Ameer Sahib* v. *Venkatarama*[1] and *President of the Taluk Board, Sivaganga* v. *Narayanan*[2] were prepared to hold that section 156 of Act V of 1884 as it then stood was applicable only to suits for compensation and for damages. Apparently, as already observed, this view of the learned Judges was adopted by the legislature and the amendment was introduced so that there may not be any doubt whatsoever about the scope of the section. It may also be pointed out that the provision regarding the tender of amends in section 156 which finds a place also in section 225 on which the learned Judges of this Court relied in support of their interpretation of section 156 (see *President of the Taluk Board, Sivaganga* v. *Narayanan*[2]) is absent in S. 80, Civil Procedure Code. Having regard to these important considerations which makes S. 225 of Act XIV of 1920 materially different in its scope from S. 80, Civil Procedure Code, I do not think it is right to

1. (1892) I.L.R. 16 M 296.
2 (1892) I.L.R. 16 M 317: 3 M.L.J. 12.
8 (1928) I.L.R. 52 M. 207: 56 M.L.J. 525.
9. (1927) L.R. 54 I.A. 338: I.L.R. 51 B. 725. 53 M.L.J. 81 (P.C.).

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rely on the decision in *Bhagchand Dagadusa* v. *Secretary of State*[9] in considering what classes of suits are included within the scope of S. 225. My attention was drawn by Mr. Bhashyam Aiyangar to the fact that in *Bhagchand Dagadusa* v. *Secretary of State*[9] it is pointed out by their Lordships of the Privy Council that the authority of the decisions in *Flower* v. *Local Board of Low Leyton*[10] and *Attorney-General* v. *Hackney Local Board*[11] is no longer binding, having regard to the subsequent development of the law in England and so it was argued that these being decisions on which the learned Judges relied in support of their interpretation of the scope of section 156 (see *Govinda Pillai* v. *The Taluk Board, Kumbakonam*[4]), it should be held that that decision and the other earlier decisions are no longer good law. If our legislature in understanding section 156 accepted the view of the law enunciated in those two cases and in order to make the position clear amended the section by introducing suitable words, then, there can be no force in the argument now urged, since obviously we have to give effect to the enactment of our legislature so long as it remains unamended with respect to this point. The two English cases referred to may have lost their authority having regard to the subsequent amendments in the wording of the relevant English Acts; but on the point under consideration section 225 remains the same as section 156 of the old Act and in this view the observations of their Lordships of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State*[9] regarding the decisions in *Flower* v. *Local Board of Low Leyton*[10] and *Attorney-General* v. *Hackney Local Board*[11] do not in any way affect the present question. In my opinion neither the decision in *Municipal Council, Dindigul* v. *Bombay Co., Ltd.*[8] nor the decision in *Bhagchand Dagadusa* v. *Secretary of State*[9] can be understood as throwing doubts on the correctness of the prior decisions of this Court in *Syed Ameer Sahib* v. *Venkatarama*,[1] *President of the Taluk Board, Sivaganga* v. *Narayanan*[2] and *Govinda Pillai* v. *The Taluk Board, Kumbakonam.*[4]

Another branch of the learned advocate's argument was that the words of section 225 are of sufficient amplitude to cover cases of the present description and that the words "the amount of compensation claimed" do not in any way narrow

1. (1892) I.L.R. 16 M 296
2. (1892) I.L.R. 16 M. 317: 3 M.L.J. 12.
4. (1908) I.L.R. 32 M 371 · 19 M.L.J. 333 (F.B.).
8 (1928) I.L.R. 52 M. 207. 56 M.L.J 525.
9 (1927) L.R. 54 I.A. 338 · I.L.R. 51 B 725: 53 M.L.J. 81 (P.C.).
10 (1877) 5 Ch D. 347.
11 (1875) 20 Eq 626.

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down the meaning of the words the "cause of action" or "the nature of the relief sought" appearing in the section. This argument is supported by a decision of the Allahabad High Court in *Munir Khan* v. *Municipal Board, Allahabad*[12] about the scope of section 326 of the United Provinces Municipalities Act (II of 1916) which except as regards clause (4) in substantial particulars agrees in its wording with section 225 of the Madras Local Boards Act. The wording of clauses (1) and (2) of the two sections are similar in all material particulars. (*See* the United Provinces Act (II of 1916) printed in I.C. Acts, Vol. 1916). It was held in *Munir Khan* v. *Municipal Board, Allahabad*[12] that the words "the cause of action" occurring in cls. (1) and (2) are of sufficient amplitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort and that the words "the amount of compensation claimed" do not narrow down the denotation of either "the cause of action" or "the nature of the relief sought," to mere suits for damages founded upon tort and evidently mean no more than this that where the plaintiff sues he must specify the amount of compensation. This decision no doubt supports the respondent's argument but none of the cases of this Court or the English cases relied on in the decision of this Court is referred to in the judgment; and further, what is more important, we know nothing as regards the history of that enactment. Having regard to the decisions of our Court which are all one way, I cannot follow the decision of the Allahabad High Court.

For the above reasons, I must hold that the decision of the Lower Court that the suit is not maintainable for want of notice under section 225 cannot be upheld.

Having regard to my view that no notice is necessary in this case, the further question whether, if notice is necessary, Ex. A would be a sufficient notice does not arise for consideration, though I am inclined to hold that it amounts to a sufficient notice within the meaning of the section.

In the result, the Civil Revision Petition is allowed with costs throughout and the case is remanded to the Lower Court for disposal on the other issues. The Court-fee in the Lower Appellate Court will be refunded.

S. A. No. 2009 of 1927.—No Second Appeal lies in this case. The Second Appeal is dismissed. No costs.

B.V.V. *Civil Revision Petition allowed.*
Second Appeal dismissed.

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12 (1929) 122 I.C. 742

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN AND SIR JOHN WALLIS.

The Commissioner of Income-tax, Bombay Presidency .. *Appellant**

v.

The Remington Typewriter Company (Bombay), Limited .. *Respondents.*

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The Commissioner of Income-tax Bombay Presidency *v.* The Remington Typewriter Company (Bombay), Ltd.

Indian Income-tax Act (XI of 1922), Ss 40, 42, 43—Agent of non-resident person—Liability to income-tax and super-tax, although not in actual receipt of profits—"Business connection in British India"

Any person who comes within the terms of section 43 of the Indian Income-tax Act, 1922, is put by that section artificially into the position of agent and assessee under section 42, sub-section (1), the word "agent" in the latter sub-section not being confined (as it is in section 40) to a person who actually receives the profits and gains

Where, therefore, it is established that the profits or gains accrued or arose to a non-resident person "directly or indirectly through or from any business connection in British India," and the agent had "any business connection" with such non-resident person, the agent is liable to assessment to income-tax and super-tax under the provisions of section 42, sub-section (1) in respect of the profits made by the non-resident, although such agent was not himself in receipt of the profits.

Commissioner of Income-tax, Bombay Presidency v. *Bombay Trust Corporation, Ltd.,* (1929) L.R. 57 I.A. 49. I.L.R. 54 Bom. 216: 58 M.L.J. 197 (P C.), followed

Judgment of the High Court, Bombay, reported in *Commissioner of Income-tax, Bombay* v. *The Remington Typewriter Company,* (1928) I L.R. 52 Bom. 726, reversed.

Appeal No. 42 of 1929 by the Commissioner of Income-tax, Bombay Presidency, from an order of the High Court of Bombay, dated the 20th March, 1928, which had the effect of setting aside an assessment of income-tax and super-tax made upon the respondent company.

The facts of the case are set out at length in the report of the proceedings in the High Court, I.L.R. 52 Bom. 726.

Dunne, K. C. and *R. Hills* for appellant.

Sir Patrick Hastings, K. C. and *J. H. Stamp* for respondents.

16th December, 1930. Their Lordships' judgment was delivered by

LORD RUSSELL OF KILLOWEN.—The dispute in this appeal has, by reason of a recent decision of their Lordships' Board, been reduced to small compass. Lord Russell.

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A statement of the relevant facts is, however, necessary.

Assessments, in respect of the two financial years 1924-1925 and 1925-1926, were made under the Indian Income-tax Act, 1922 (hereinafter referred to as the Act), upon the Remington Typewriter Company (Bombay), Limited, as agent for the Remington Typewriter Company of New York. This last-mentioned company is a company incorporated in the United States of America and carries on the business of manufacturing and selling the well-known Remington typewriting machine. These two companies may be conveniently referred to as the Bombay Company and the American Company respectively.

The assessments were made in respect of (1) dividends paid by two Indian Companies, viz., the Remington Typewriter Company (India), Limited and the Remington Typewriter Company (Madras), Limited, to the American Company in respect of its shareholding in the two Indian Companies; (2) dividends paid by the Bombay Company to the American Company in respect of its shareholding in the Bombay Company; and (3) profits presumed to have been made by the American Company on the sales of its typewriters to the other three companies.

The Bombay Company was registered under the Indian Companies Acts on the 19th December, 1921, with a capital of 6,00,000 rupees, divided into 60,000 shares of 10 rupees each, its principal object being to enter into and carry into effect the agreement next mentioned. By an agreement, dated the 18th January, 1922, the Bombay Company bought from the American Company the good will of its business in a territory therein defined, which included the Bombay Presidency, Central Provinces and certain other adjoining portions of India. The consideration for the sale was the sum of six lakhs to be paid and satisfied by the allotment to the American Company or its nominees of 60,000 fully-paid shares in the Bombay Company. The purchase was duly completed, and the American Company holds all the shares of the Bombay Company with the exception of three shares, each of which stands in the name of a nominee of the American Company.

As regards the other two Indian Companies the position as between them and the American Company is in substance the same, their respective business territories between them covering the rest of India.

The sections of the Act with which this appeal is principally concerned are the sections which constitute Chapter V of the Act

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dealing with "Liability in Special Cases"; in particular, sections 40, 42 and 43.

Section 40 deals with the case of a guardian, trustee or agent of any person being a minor, lunatic or idiot or residing out of British India being in receipt on behalf of such person of any income, profits or gains chargeable under the Act.

Section 42 (1) deals with the case of profits and gains accruing or arising to a person residing out of British India directly or indirectly through or from any business connection or property in British India. It provides that such profits and gains shall be deemed to be income accruing or arising within British India and that they shall be chargeable to income-tax in the name of the agent of any such person.

Section 42 (2) deals with the case of certain persons not resident in British India carrying on business with persons resident in British India, where the course of business between the two is so arranged that the business done by the resident in pursuance of his connection with the non-resident produces to the resident either no profits or less than the ordinary profits which might be expected; and it provides that the profits derived therefrom or which might reasonably be deemed to have been derived therefrom shall be chargeable to income-tax in the name of the resident.

Section 43 provides (amongst other things) that any person having any business connection with a person residing out of British India, upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person, shall, for all the purposes of the Act, be deemed to be such agent.

The Bombay Company, under section 66 of the Act, required the Commissioner of Income-tax, Bombay, to refer to the High Court certain questions of law. The Commissioner accordingly drew up a statement of the case and referred it, with his own opinion thereon, to the High Court.

The questions so referred were in the following terms:—

1 Whether the profits of the Remington Typewriter Company of New York upon goods exported to British India are or can be held to be chargeable to Income-tax and super-tax under section 42 (1) of the Act or otherwise

2 Whether super-tax upon dividends received by the Remington Typewriter Company of New York from the Remington Typewriter Company (Bombay), Limited, the Remington Typewriter Company (India), Limited, and the Remington Typewriter Company (Madras), Limited, can under section 42 (1) of the Act or otherwise be charged against and collected from an agent.

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3. Whether the Remington Typewriter Company (Bombay), Limited, is or can be held to be the agent of the Remington Typewriter Company of New York under section 43 of the Act.

In answer to the reference, the High Court (Marten, C.J. and Kemp, J.) on the 20th March, 1928, made the following order:—

For the reasons stated in the accompanying judgment, the Court gives the following answers to the questions submitted to it

Questions I and II.—The Bombay Company, though an Agent of the American Company within the meaning of section 43 of the Act, cannot be assessed to income-tax or super-tax under section 42 (1) of the Act or otherwise in respect of any profits made by the American Company on the sale of its goods to the Bombay Company, inasmuch as the Bombay Company was not in receipt on behalf of the American Company of the profits in question as is requisite under section 40. For similar reasons, the Bombay Company is not liable to be assessed to super-tax upon dividends paid to the American Company by the Calcutta Company or the Madras Company; nor upon dividends of its own shares paid by it to the American Company. Super-tax upon dividends in the Bombay Company can be recovered by deduction by the Principal Officer of the Bombay Company under sections 57 and 58 of the Act.

Question III—Yes.

From this it appears that the High Court's view was that the Bombay Company, although an agent of the American Company within the meaning of section 43 of the Act, could not be assessed in respect of profits or gains accruing or arising to the American Company, and covered by the description used in section 42 (1) of the Act, unless the Bombay Company had been in receipt thereof on behalf of the American Company. In other words, the High Court held that the word "agent" in section 42 (1) was used in the same sense as that in which the word "agent" is used in section 40, viz., a person who receives the profits and gains. In adopting this view, the High Court followed an opinion which they had already expressed in a previous reference made to them at the requirement of the Bombay Trust Corporation, Limited (see *Commissioner of Income-tax, Bombay* v. *Bombay Trust Corporation.*[1])

In that case a Hongkong Company had advanced to the Bombay Trust Corporation, Limited, large sums on deposit at interest. The Corporation was assessed as agent of the Hongkong Company in respect of the payments of interest on the sums advanced. The High Court, while holding that the interest paid was a profit or gain accruing or arising to the Hongkong Company from a business connection in British India within section 42 (1), also held that though the Corporation was to be deemed the agent of the Hongkong Company

1. (1928) I.L.R. 52 Bom. 702.

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under section 43, it could not be assessed in respect of the interest because it had not been in receipt of it as required by S. 40.

This view of sections 42 (1) and 43 must now be treated as erroneous. An appeal from the order of the High Court in the last-mentioned case was brought before their Lordships' Board last year, and the appeal was allowed upon the ground that any person who comes within the terms of section 43 is put by that section artificially into the position of agent and assessee under section 42 (1). (*Commissioner of Income-tax v. Bombay Trust.*[2])

That decision of the Board concludes the present appeal if the facts of this case establish (*a*) that the profits or gains in question accrued or arose to the American Company "directly or indirectly through or from any business connection . . . . in British India," and (*b*) that the Bombay Company had "any business connection" with the American Company.

Upon this part of the case the affirmative answer given by the High Court to Question III was based upon the view that the necessary business connection existed in the present case.

Although no appeal was lodged by the respondents against that part of the High Court's order, their Lordships took the view that the appellant's appeal raised for consideration the correctness of every part of the High Court's order. The question whether the necessary business connection existed was accordingly argued before the Board.

As a result of that argument their Lordships feel, no doubt, that the answer given by the High Court to Question III was correct.

The Bombay Company was formed for the express purpose of acquiring from the American Company and carrying on in a particular area the American Company's business of selling the American Company's manufactures.

Although no contractual obligation exists by which the Bombay Company is compelled to purchase any of the manufactures of the American Company, the flow of business between the two companies is secured by the fact that the ultimate and complete control of the Bombay Company is vested in the American Company which owns all its shares.

It is not a question whether the Bombay Company is in law the agent of the American Company. The question is whether the facts of the case are such that the Bombay Company can

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2 (1929) L.R. 57 I.A. 49: I.L.R. 54 Bom. 216: 58 M.L.J. 197 (P.C)

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properly be deemed to be such agent, under section 43. The answer depends upon whether in this case a business connection exists within the meaning of that section. For the reasons appearing above their Lordships are of opinion that it does.

For the same reasons their Lordships think that a business connection exists in the present case within the meaning of section 42 (1), not only between the Bombay Company and the American Company, but also between the American Company on the one hand and each of the two other Indian Companies on the other hand.

The necessary business connection having thus been established, there can in their Lordships' opinion be no doubt that the profits and gains in question accrued or arose to the American Company "directly or indirectly through or from a business connection in British India."

For these reasons their Lordships are of opinion that the appeal succeeds, and in their Lordships' view, the correct form of order to make in this and similar cases is to amend the order of the High Court so as to bring it into conformity with the decision of the Board.

The order of the High Court should be amended so as to run thus:

"The Court gives the following answers to the questions submitted to it:—

"*Question I*—Yes, under section 42 (1) of the Act.

"*Question II*—Yes, under section 42 (1) of the Act.

"*Question III.*—Yes.

"The Court directs that the Commissioner do recover the costs of this reference and that the costs be taxed by the Taxing Master as on the Original Side scale."

The respondents must pay the costs of this appeal. A petition by the appellant for the admission of a supplemental record was not opened before their Lordships. This will be dismissed with costs to be set off against the costs of the appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents: *Ranger, Burton and Frost.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Subbaratnammal .. *Appellant** (*Petitioner*)

v.

Seshachala Naidu .. *Respondent* (*Respondent*).

Subba-ratnammal v. Seshachala Naidu.

Guardian and Wards Act (VII of 1890), S 7—Guardianship of minor's person—Person residing outside British India—Appointment as guardian—Permissibility.

It is clearly against the intention of the Guardian and Wards Act that any one residing outside British India should be appointed guardian of a minor's person, as over such a guardian the Court cannot exercise its proper control

Batcha Chetty v *Ponnuswami Chetty*, (1912) 22 M.L.J. 68, relied on

Appeal against the order of the District Court of Chittoor. dated 10th November, 1930 and made in O.P. No. 18 of 1930.

K. Rajah Aiyar and *K. Narasinga Rao* for appellant.

S. Varadachariar and *S. V. Venugopalachariar* for respondent.

The Court delivered the following

JUDGMENT.—In this case it appears that the appellant is a resident of Mysore. It is clearly against the intention of the Guardian and Wards Act that any one residing outside British India should be appointed guardian of a minor's person, as over such a guardian the Court could not exercise its proper control—see *Batcha Chetty* v. *Ponnuswami Chetty*.[1] The appellant, therefore, cannot herself be appointed guardian of the minor under the Act. For this reason without going into any of the other questions raised we find it unnecessary to interfere in the appellant's favour with the order of the learned District Judge. This will not preclude the appellant from seeking any other remedy open to her.

The appeal is dismissed.

B.V.V. *Appeal dismissed.*

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*C.M A No 459 of 1930 18th February, 1931.

1 (1912) 22 M.L.J. 68.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Kanaga Kosavan *alias* Kanakachala Kosavan .. *Petitioner** (*Accused*).

In re Kanaga Kosavan.

Indian Penal Code (XLV of 1860), Ss 300, Exception (5), 302 and 304—Culpable homicide not amounting to murder—Death caused at the request of the victim

Where the murder with which the accused is charged is found to have been committed by him at the request of the deceased woman who, in a mood of desperation, had earnestly requested him to cut her neck and put an end to all her troubles, the proper conviction should be under S. 304 for culpable homicide not amounting to murder and not under S 302

Queen v. *Baboolun Hijrah,* (1866) 5 W.R. (Cr) 7, *Queen* v *Anunto Kurnagat,* (1866) 6 W.R (Cr) 57; *Ujagar Singh* v *Emperor,* (1917) 43 I C. 413; *Emperor* v *Ram Dayal,* (1913) I.L R. 36 All 26 and *Masum Ali* v. *Emperor,* A.I.R. 1929 Lah 50, followed.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 53 of the calendar for 1930.

Appeal by the prisoner against the said sentence.

The accused was a bachelor. The deceased woman had lost her husband a long time back and the accused had been keeping her for about four years prior to the murder. The evidence showed that the relationship was resented by the relatives of both the accused and the deceased and that they were in consequence excluded from all the social functions of their community. Owing to the refusal of the woman to give up the society of the accused, she was obliged to leave the house of her elder brother with whom she had been residing and the accused and the deceased woman had been wandering together from place to place in search of a house to live in, but no house was available. On the 13th November, 1929, in the early morning at the junction of the Arasapalayam and Seerapalayam roads (Coimbatore District), the woman feeling desperate, sat down on the road, took the knife out of his waist and 'asked him to cut and throw her away." The accused thereupon killed her and when he was taken into custody, made a statement (Ex. E) confessing his guilt.

An attempt was made by the prosecution to show that the accused deliberately murdered her with a view to get rid of her as she was an embarrassment to him. But this was disbelieved by their Lordships.

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*R T. No 80 of 1930 and Cr. Appeal No. 323 of 1930. 25th September, 1930

In re Kanaga Kovan.

K. K. Sridharan for accused.
The Ag. Public Prosecutor for the Crown.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—[After setting out the facts, continued as follows:—]

It is not impossible that under these circumstances feeling desperate and depressed she asked the appellant to kill her and there is no real motive proved by the prosecution for the appellant deliberately killing her of his own free will. I think that in this state of affairs he must be given the benefit of the doubt and that the whole of his confession must be accepted and that I must find that he killed the deceased at her request. What, then, is the legal position? It is argued on his behalf that on these facts the appellant is entitled to the benefit of Exception (5) to S. 300, Indian Penal Code. It reads as follows:—

"Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

From the evidence it is obvious that the deceased was more than 18 years of age and she was therefore able to consent to her killing. Several authorities on this point were referred to and all of them seem to me clearly to support the appellant's contention. The first of these is *Queen* v. *Baboolun Hijrah*,[1] where it was held that if a man above the age of 18 years submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder. In *Queen* v. *Anunto Rurnagat*[2] the accused and his wife being overwhelmed with grief for the loss of their child determined to kill themselves. His wife made repeated requests to him that he should kill her and after a time he did so by striking her three blows with an axe. The Sessions Judge who tried the case was of the opinion that Exception (5) to S. 300, Indian Penal Code, did not apply to the case because he was of the opinion that the woman was killed whilst she was asleep; but on appeal it was held that the case did come within Exception (5) to S. 300, Indian Penal Code and that the accused was guilty of culpable homicide not amounting to murder punishable under S. 304, Indian Penal Code. Then there is *Queen-Empress* v. *Nayamuddin*,[3] where in a case in

1 (1866) 5 W.R. (Cr.) 7. 2. (1866) 6 W.R (Cr.) 57.
3. (1891) I.L.R. 18 C. 484 (F.B.).

In re Kanaga Koravan.

Beasley, C. J.

which it was found that accused persons were guilty of rioting armed with deadly weapons in a pre-meditated and pre-arranged fight which appeared to be a regular pitched battle or trial of strength between the two parties concerned in the riot and that in the course of the riot and in prosecution of the common object of the assembly, one of the accused attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of Exception (5) to S. 300, Indian Penal Code and it was held that the case did not fall within the exception. O'Kinealy, J., was of the opinion that before Exception (5) can be applied, it must be found that the person killed was, with a full knowledge of the facts, determined to suffer death or take the risk of death and that this determination continued up to, and existed at, the moment of his death. In *Ujagar Singh* v. *Emperor*[4] the accused killed his step-father, who was an infirm old man, with his consent in order to involve some of their enemies in trouble by charging them with the murder and it was held that the case was covered by Exception (5) to S. 300, Indian Penal Code and that the accused was guilty of an offence under S. 304 of the Penal Code. In *Emperor* v. *Bharat Bipari*,[5] the accused, the parents of a child, offered the child to the crocodiles in a tank in the belief that though the child would be taken away, it would be returned unharmed and thereafter would lead a charmed life and attain to a good old age, it was held that they were guilty of an offence under the latter part of S. 304, Indian Penal Code. This case, of course, is not strictly in point as this was not a case of Exception (5) to S. 300, Indian Penal Code. In *Emperor* v. *Ram Dayal*[6] it was held that persons actively assisting a Hindu widow in becoming a sati are guilty of the offence of abetment of suicide as defined in S. 306, Indian Penal Code. In *Emperor* v. *Vidyasagar Pandya*,[7] *Emperor* v. *Ram Dayal*[6] was followed. In *Masun Ali* v. *Emperor*,[8] a case very much in point, the accused strangled his beloved aged 16 years to death upon their decision to die together in despair of the future separation and feeling that they could not live apart and it was held that this was essentially the case where the spirit, if not the letter, of Exception (5) may be applied and though convicted of murder, the sentence should be transportation for life. Had

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4. (1917) 43 I.C. 413.
5. (1920) 62 I.C. 414.
6. (1913) I.L.R. 36 A. 26.
7. A.I.R. 1928 Pat. 497.
8. A.I.R. 1929 Lah. 50.

the murdered girl been above the age of 18, the offence would have been culpable homicide not amounting to murder. There is an unreported Madras case, viz., Cr.R.C. No. 646 of 1925, where the wife was beaten to death in the belief that it would drive the devil out of her and it was held that the accused was guilty of an offence under S. 304, Indian Penal Code.

In re Kanaga Koravan

Beasley, C. J.

It is obvious from all these authorities, the facts of this case being as I have found them, the appellant is entitled to the benefit of Exception (5) to S. 300, Indian Penal Code and must be convicted only of culpable homicide not amounting to murder under the earlier part of S. 304, Indian Penal Code. His conviction under S. 302 of the Indian Penal Code must be set aside and also the sentence of death passed upon him and in respect of his conviction under S. 304, Indian Penal Code, earlier part, he must receive the maximum sentence, namely transportation for life.

Pakenham Walsh, J.

Pakenham Walsh, J.—I agree.

S.R. *Sentence of death set aside and the accused sentenced to transportation for life.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD MACMILLAN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

Padmalav Achariya and another .. *Appellants**

v.

Srimatyia Fakira Debya and others .. *Respondents.*

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Padmalav Achariya v. Srimatyia Fakira Debya

Indian Limitation Act (IX of 1908), Art. 118—Suit by Hindu widow to recover possession of deceased husband's estate—Defence of adoption by deceased—Proof of—Absence of contemporaneous evidence—Entries in family accounts not forthcoming—Nature of evidence necessary.

A suit by a Hindu widow to recover possession of the estate of her deceased husband from the defendant who claimed to be a son adopted by the deceased is not governed by Art. 118 of the Indian Limitation Act, 1908, and is well in time if brought within 12 years from the death of the husband. *Kalyanadappa* v. *Chanbasappa,* (1924) L.R. 51 I.A. 220: I.L.R. 48 Bom. 411: 46 M.L.J. 598 (P.C.), followed.

Where, in answer to a claim by a Hindu widow to recover her deceased husband's estate, the defendant relies on his adoption by the deceased, the adoption must be established by clear and satisfactory evidence, free from all suspicion of fraud and so consistent and probable as to leave no occasion

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*P.C. Appeal No. 99 of 1929. 19th January, 1931.
Patna Appeal No. 10 of 1928.

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Padmalav Acharya v. Srimatyia Fakira Debya.

for doubt of its truth. The necessity for evidence of this unimpeachable character is all the greater in the absence of any contemporaneous record of the adoption either in a deed of adoption or by entries in family accounts which ought to have been forthcoming *Sootrugun* v. *Sabitra,* (1834) 2 Knapp P.C. 287 and *Diwakar Rao* v *Chandanlal Rao,* (1916) I.L.R. 44 Cal 201: 32 M.L J. 636 (P C), referred to.

Judgment of the High Court, Patna, affirmed.

Appeal No. 99 of 1929 from a decree of the High Court, Patna, dated the 13th March, 1928, reversing a decree of the Court of the Subordinate Judge of Cuttack, dated the 27th April, 1926 and decreeing a suit which he had dismissed.

The respondent, Fakira, a Pardanashin Hindu widow, brought that suit *in forma pauperis* to recover, as his heir, the estate of her deceased husband Abhimanyu from the appellants and the other respondents who were his kinsmen. The family pedigree and the facts of the case are set out in their Lordships' judgment.

The main question in the present appeal was whether the appellant Padmalav had established his adoption. The Subordinate Judge decided in his favour, but the High Court reversed that decision and held that the respondent Fakira was the rightful heir to her husband.

Further questions arose—

(1) Whether the suit was barred by limitation. The Subordinate Judge held that it was barred under Art. 118 of the Indian Limitation Act, 1908; the High Court held that it was well within time being brought within 12 years of Abhimanyu's death, and that the decision relied on by the Subordinate Judge had been overruled by the Privy Council in *Kalyanadappa* v. *Chanbasappa.*[1]

(2) Whether the plaintiff was bound by a compromise under which she accepted a small allowance from the 1st appellant. Both Courts held concurrently that she was not bound by the terms which were never explained to her and which were drawn up under threat of criminal proceedings.

Dube for appellants.

Raikes, K.C. and *McNair* for respondent Fakira.

19th January, 1931. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The parties in the case belong to a Brahmin family of good standing who carried on a money-lend-

1. (1924) L.R. 51 I.A. 220; I.L.R. 48 Bom 411: 46 M.L.J. 598 (P.C).

ing business in the District of Cuttack in Orissa and acquired movable and immovable property valued at two lakhs of rupees. The defendants are the sons and grandsons of Narsingh, who belonged to the senior branch of the family and died in 1914, and the plaintiff, Fakira, is the widow of Abhimanyu, the posthumous son of Kulamoni, who belonged to the junior branch. According to the defendants Kulamoni before his death in 1877 adopted Narsingh's second son Udaya, and similarly in 1903 Kulamoni's son Abhimanyu, twelve years before his death in 1915, adopted Udaya's eldest son Padmalav, the 1st defendant.

In June, 1924, nine years after her husband's death, the plaintiff, Fakira, filed the present suit in the Court of the Subordinate Judge of Cuttack to recover her husband's share in the suit properties. She alleged that before her husband's death Narsingh's son, Udaya, had set up a false case that he had been adopted by Kulamoni and that for the sake of peace and to avoid litigation, it had been settled that he should have a one-fourth share of the properties which would otherwise have fallen to her husband, and accordingly she only claimed the remaining three-fourths. She denied that the adoption of the 1st defendant, Padmalav, by her deceased husband, Abhimanyu, had ever taken place, and alleged that she had been terrorized by some of the defendants and others into signing under a threat of criminal proceedings a deed of settlement under which she was only to be entitled to maintenance.

There were other issues, but the main question in both the Lower Courts was as to the factum of the adoptions set up by the defendants. The Subordinate Judge found that both adoptions were proved and dismissed the plaintiff's suit.

The plaintiff thereupon appealed *in forma pauperis* to the High Court at Patna. Das, J., who delivered the judgment of the Court, expressed grave doubts as to the earlier adoption, but did not record a formal finding as the plaintiff had not disputed Udaya's right to the one-fourth share which was all he would in any case have been entitled to on partition with the plaintiff's husband, a natural son born after the adoption.

As regards the second adoption, he held that it was clouded with suspicion which the defendants had failed to dispel, and accordingly the High Court reversed the decree of the Lower Court and decreed the plaintiff's suit.

From this decree the defendants preferred the present appeal to His Majesty in Council on the grounds, as stated in the appellant's case, that the judgment of the High Court is largely based

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on suspicion for which there is no justification; that the judgment of the Subordinate Judge is based on the credibility of witnesses examined before him which the High Court had not given any cogent reasons for disbelieving; that the weight of the evidence is in favour of the appellants; and that the suit is barred by limitation.

As regards limitation the Subordinate Judge had held that the suit was barred under Art. 116* of the Limitation Act, but as pointed out in the judgment of the High Court, it is now finally settled by the judgment of the Board in *Kalyanadappa* v. *Chanbasappa*[1] that this article is inapplicable, and consequently the suit is not barred.

For better understanding of the case it appears desirable in the first place to show the state of the family in the absence of the alleged adoptions.

Sudam Achariya.

- Srikar.
  - Bhagirathi.
    - Narsingh, died September, 1914
      - Gopal, Defendant 4.
      - Udainath, died 1921.
        - Padmalav, Defendant 1
        - Gagendra, Defendant 2
        - Chakradhar, Defendant 3
      - Banchanidhi, Defendant 5
      - Batakrishna, Defendant 6.
      - Rajkishore, Defendant 7.
- Haldahar.
  - Damodar.
    - Kulomani, died 1877
      - Abhimanyu, died 19th August, 1915. Married Fakira Debya, Plaintiff.

It is common ground that for nearly forty years before his death in 1914 Narsingh was the *karta* of the joint family, and the plaintiff's husband, Abhimanyu, was the sole representative by birth of the junior branch, and was at any time after attaining majority entitled to separate, and if there had been no adoption by his father, Kulamoni, to take half of the family property

*Article 116 is a clerical error for Art. 118—*K J R*

1. (1924) L.R. 51 I.A. 220; I.L.R. 48 Bom. 411: 46 M.L.J. 598 (P.C.).

on partition, leaving the other half for Narsingh, his five sons and their issue. Further, according to the evidence Abhimanyu was an unsatisfactory member of the family, and did not attend to the family business or look after the management of their estates. His widow says that he was known in the village as the "Mad Babu," and latterly he spent most of his time in a *Natch akra* which he had built for the amusement of himself and his friends in the village. The word is translated dancing saloon in the judgment of the High Court, and it would appear to have been a sort of village assembly room where the entertainment would not be confined to *nautches*, but might also include music and other Indian forms of dancing.

Now the case for the respondents, which receives considerable support from the judgment of the High Court, is that in this unsatisfactory state of things from his point of view, Narsingh at some time after Kulamoni's death in 1877 began to pass off his second son Udaya as having been adopted by Kulamoni before the birth of the latter's own son Abhimanyu; and that much later Narsingh began to fabricate evidence that Udaya's son Padmalav, the 1st defendant, had been adopted by Abhimanyu, it is now said, in the year 1903. As the defendants' case is that Kulamoni also directed that in the event of a natural son being born to him, Udaya, the adopted son, was to share equally with him, the result would be to reduce Abhimanyu's share to one-fourth of what he would otherwise have been entitled to.

As regards the earlier adoption in 1877, it is argued for the respondent that it is in the last degree improbable that Kulamoni, who as shown in the judgment of the High Court, was a young man still in the thirties at the time of his death, and according to the defendants, had already had male children who had died, would have adopted a son from the other branch of the family at a time when his own wife was enceinte and might bear him a natural son, as in fact she did; and it is, if possible, even more improbable, that he should have directed that the adopted boy should share equally with the after-born natural son.

Similarly, it is said to be extremely improbable that in 1903, when he was at most twenty-six years of age, Abhimanyu would have resorted to adoption merely because, as alleged by the defendants, his first wife, who was then only fourteen or fifteen, had not yet borne children and was suffering apparently from some disorder of the uterus.

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In their Lordships' opinion these considerations of themselves make it incumbent on the Court to satisfy itself that in each of these cases the factum of the adoption is established by clear and satisfactory evidence.

The necessity is all the greater in the absence of any contemporary record of the adoptions either in a deed of adoption or by entries in the detailed accounts which families in this position in India are in the habit of keeping. In the case of the second adoption the defendants' own evidence is that expenses were incurred, which, in their Lordships' opinion, must have found a place in the family accounts. Their Lordships agree with the High Court that the defendants' explanation of their failure to produce these accounts in support of their case is wholly unsatisfactory, and in these circumstances, this case is governed by an early decision of the Board, *Sootrugun* v. *Sabitra*,[2] where their Lordships observed with particular reference to the absence of entries in the accounts which ought to have been forthcoming:—

"That in no case should the rights of wives and daughters be transferred to strangers or more remote relatives, unless the proof of adoption, by which the transfer is effected, be proved free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubt of its truth."

This case has been followed by this Board in a more recent case, *Diwakar* v. *Chandanlal Rao*[3] and it has next to be seen whether the evidence for the defendants is of this unimpeachable character.

It will be convenient in the first place to deal with the documentary evidence in support of the 1st defendant's adoption in 1903, which proves on examination to be exceedingly meagre. Exhibit O is a sale-deed of the 27th April, 1909, for Rs. 46, of a small share in certain land in favour of Shri Gopinath Thakur, the village god, "through Marfatdar Padmalav Achariya, minor, represented by father and guardian, Abhimanyu Achariya." Why the sale-deed to the god should have been effected in the name of the 1st defendant, who, as appears from the next document, was then five years old, rather than in the name of his grandfather Narsingh, the *shebait* of the deity, is not explained, and the sale-deed, which was registered though it did not require registration, has every appearance of having been given this form for the express purpose of supporting the alleged adoption.

2. (1834) 2 Knapp P.C. 287.

3. (1916) I.L.R. 44 C. 201 at 208: 32 M.L.J. 636 (P.C.)

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It is not shown that Abhimanyu knew anything about it, and the fact that at the subsequent revenue settlement the first defendant appeared in the register as owner of the share, and that the public had the fullest opportunity of inspecting the register at several stages, does not render it probable that any of the people in the village noticed it or that if they did they would have ventured or cared to interfere in the internal affairs of one of the leading families in the village.

Exhibit C is a deed of sale of the same year for Rs. 200 of an eight pies share in certain lands in favour of the first defendant, described as "Babu Padmalav Achariya, aged five years, son of Babu Abhimanyu Achariya," and of Dinabandhu Misra, the family *purohit* or priest. Here again it is not shown that Abhimanyu knew the property had been purchased in the name of the boy Padmalav, nor is it explained why it was so purchased. In their Lordships' opinion it cannot be inferred from these documents that Abhimanyu knew that Padmalav was being put forward as his adopted son.

After Abhimanyu's death in 1915 there was a suit about this property dealt with in Exhibit C, and a written statement was filed by Padmalav, the minor first defendant, which purports to be signed by the plaintiff as his mother and guardian, but she denies her signature, and there is no evidence that she in fact signed it or that it was explained to her.

Narsingh died in November, 1914, and the plaintiff's case is that not long before his death he effected an amicable partition between Abhimanyu and Udaya. Abhimanyu, she says, denied Udaya's adoption, but ultimately for the sake of peace and to avoid litigation consented to his taking a one-fourth share; and she has framed her suit accordingly. The Subordinate Judge found the separation not proved, but the plaintiff's evidence is confirmed by the evidence of the defendants' fourth witness, who was called to prove the alleged adoption, and spoke very positively about the separation in cross-examination. It is also supported by Exhibit 3, a letter from Narsingh to Abhimanyu in 1913, which the Subordinate Judge appears to have misread. That letter shows that Abhimanyu was then pressing for a partition, and that the division of shares was already far advanced. The High Court, however, did not consider it necessary to record any finding on this issue.

Abhimanyu did not long survive Narsingh, but was carried off, it is said, by cholera a few months later, in August, 1915,

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when his mother committed suicide, leaving the plaintiff and her two minor daughters as the sole representatives of the junior branch of the family, apart, of course, from the alleged adoptions.

In their Lordships' opinion there can be no doubt that Padmalav, the first defendant, officiated as Abhimanyu's son at his funeral ceremonies, though the plaintiff denies it. It is also clear that Padmalav was thenceforth treated by the family as a duly adopted son and that the plaintiff for a long time was not in a position to make any effective resistance, as she was completely dependent on her husband's family, and had no one to help her. The defendants have put in evidence three letters purporting to have been written by the plaintiff about this time to her "brother-in-law," Udaya, in which she signs herself "Padla-bow," or Padmalav's mother. She denied having written them, and the Appellate Court considered it improbable that she would have used a signature which admitted the adoption, especially in view of the evidence-in-chief of the defendants' third witness that at this time she went by the name not of "Padla-bow," but of "Sobha-bow," or the mother of her daughter Sobha. This was decidedly not the answer wanted, and the witness qualified it by adding that before Sobha's birth—and therefore also before the letters could have been written—she had been known as "Padla-bow." On these grounds, and also having regard to the evidence as to handwriting, the Appellate Court held that these letters had not been proved to have been written by the plaintiff.

For the appellants it was argued that their genuineness sufficiently appeared from the contents, but to this it was answered that they were fabrications reproducing genuine letters with the necessary alterations. In their Lordships' opinion they are not above suspicion, and it would be unsafe to treat them as decisive of the present case. They would also observe in this connection that what has to be proved in this case is the factum of the adoption in 1903, and that on this issue admissions made by the plaintiff during her widowhood while she was entirely in the power of her husband's relations would necessarily carry much less weight than if made at an earlier period.

That the plaintiff had not abandoned her claims to her husband's estate, and that the defendants were afraid of them, appears sufficiently, in their Lordships' opinion, from the steps they took in 1921 to extort a renunciation from her by threats of criminal proceedings. While the plaintiff was absent from home on a visit to a temple, Udaya and others broke into her

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house and carried off all her jewels and other valuables. When she came back she found no difficulty in getting one of Udaya's brothers and others to assist her in retaking possession. A pretext was thus afforded for launching proceedings against her under section 107 of the Criminal Procedure Code in which those who had assisted her were duly joined. There is no documentary evidence as to these proceedings, but according to the defendants, owing to the position of the family the case was taken up by the District Magistrate himself, and the defendants' seventh witness, a Police Inspector of the Criminal Investigation Department, who was then at Cuttack, was appointed to investigate it.

According to his evidence, the fourth defendant, Narsingh's eldest son, who is one of the leading lawyers at Cuttack, had an interview with the District Magistrate at Cuttack, and was asked by him to go to the village with the defendants' fourth witness, Udaya's wife's brother, who is a manager of the Court of Wards, and the Police Inspector, and to bring about a settlement. It appears from the deed of compromise that they gave out that they were acting at the request of the Collector, and this in itself was calculated to overawe the plaintiff. Exactly what happened it is of course impossible to say. The plaintiff's story is that a constable threatened to handcuff her unless she signed. The defendants' witnesses say that it took two days to bring about the settlement, and that when she had communicated her acceptance to the Police Inspector the compromise was drafted by Narsingh's eldest son, the fourth defendant.

It is nowhere expressly stated in the compromise that Padmalav is the adopted son of Abhimanyu, but it proceeds on that footing and provides that the plaintiff is to live and mess separately from Padmalav and that he is to pay her maintenance which is to be a charge on his 8 annas share of the family property, that is to say, the share he took as Abhimanyu's adopted son, and that he is to hand over certain articles to her. "Except as aforesaid, Fakira has no claim to any other property of Padmalav nor will Padmalav be entitled to claim any property from Fakira" It thus amounted to a complete renunciation of her claim to succeed to her husband's estate.

Both the Lower Courts have held the compromise not to be binding on the plaintiff and the High Court has further commented on the inadequate provision made for the plaintiff and her daughters and the oppressive conditions imposed upon her.

In their Lordships' opinion the whole of this incident far from dispersing the clouds of suspicion resting upon these

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alleged adoptions is, if anything, calculated to darken them, especially having regard to the fact that the Subordinate Judge's finding as to the factum of the second adoption is largely based on the evidence of two of these arbitrators. Their Lordships agree with the learned Judges of the High Court that they were not only near relatives but also partisans of the defendants, and that it would be unsafe in a case of this kind to act upon their evidence.

In their Lordships' opinion both these adoptions are most improbable in themselves and are not supported by the contemporaneous evidence which ought to have been forthcoming. The High Court has dealt very fully and carefully with the oral evidence, and has arrived at the conclusion that it cannot be regarded as dispelling the grave suspicions in which the defendants' case is involved; and their Lordships, after a careful and anxious consideration of the whole evidence, both oral and documentary, see no reason to differ from that conclusion. In their opinion the appeal fails and should be dismissed with costs and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins and Hunter.*

Solicitors for respondent, Fakira: *W. W. Box & Co.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Upadrasta Venkatalakshmamma .. *Appellant* (2nd Respondent)*

v.

Garikipati Seshagiri Rao .. *Respondent (Petitioner).*

Venkatalakshmamma v. Seshagiri Rao.

Civil Procedure Code (V of 1908), S 48 and O 22, Rr 3, 4 and 12—Pendency of execution proceeding—Death of judgment-debtor—Substitution of legal representative—Fresh execution petition if necessary—Nature and effect of Rr. 3, 4 and 12 of O. 22—Applicability of S 48 to application made in pending execution petition

When an execution proceeding is commenced against a judgment-debtor it can be continued after his death by substituting the name of the legal representative in the place of that of the deceased judgment-debtor in the

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*A.A.A.O. No. 213 of 1927. 25th November, 1930.

execution petition. It is not necessary in such a case to file a fresh execution petition. Venkatalakshmamma *v.* Seshagiri Rao.

Jang Bahadur v. *Bank of Upper India, Ltd*, (1928) L.R. 55 I.A. 227: I.L.R. 3 Luck 314: 55 M.L.J. 545 (P.C.), relied on

Palaniappa Chettiar v. *Valliammai Achi*, (1926) I.L.R. 50 Mad. 1: 51 M.L.J. 745, disapproved.

Purushottam v *Rajbai*, (1909) I.L.R. 34 Bom 142, *Bhagwan Das* v. *Jugul Kishore*, (1920) I.L.R. 42 All 570, *Monmotho Nath Mitter* v *Rakal Chandra Tewary*, (1909) 10 C.L.J. 396, *Sundayee Ammal* v. *Krishnan Chetty*, (1928) I.L.R. 51 Mad 858: 55 M.L.J. 497 and *Ramanathan Chettiar* v *Ramanathan Chettiar*, (1928) 30 L.W. 995, referred to.

The general principle of the Code of Civil Procedure is that if a party can take proceedings against another person and that person dies the remedy does not lapse but proceedings may be taken against the dead person's representative. Rules 3 and 4 of O 22 do not create the right to bring the legal representatives on record but merely penalise those who do not exercise that right promptly. And R 12 only declares that the legislature did not think it proper to impose upon decree-holders this penalty

Section 48 of the Code can apply only when a fresh execution petition has to be filed and not when an execution application is made in a pending execution petition.

Appeal against the order of the Court of the Subordinate Judge of Bapatla, dated the 3rd day of January, 1927, and made in Appeal No. 270 of 1925 (A.S. No. 59 of 1925 on the file of the District Court, Guntur) preferred against the order of the Court of the District Munsif of Tenali, dated 18th November, 1924, in E.P. No. 125 of 1924 in O.S. No. 179 of 1912.

P. Satyanarayana Rao for appellant.

T. V. Venkatarama Aiyar for respondent.

The Court delivered the following

JUDGMENTS. *Reilly, J.*—In this case a decree was obtained by the plaintiff for money against one Ramachandrayya on the 29th February, 1912. After a number of other execution petitions eventually a petition, E.P. No. 125 of 1924, was put in for execution of the decree against Ramachandrayya on the 18th February, 1924. In the course of those proceedings it came to light that Ramachandrayya had disappeared seven or eight years earlier, and therefore it was presumed that he was dead. The decree-holder in those circumstances wished to prosecute the same execution petition against Ramachandrayya's widow as his legal representative and put in an application E.A. No. 543 of 1924 for that purpose on the 5th July, 1924. It will be seen that that application to treat the widow as Ramachandrayya's legal representative was put in more than 12 years after the date of the decree. It was contended that on account of that lapse of time, section 48 of the Code of Civil Procedure Reilly, J

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prevented the execution against the widow continuing. The widow took some other objections to the execution in the District Munsif's Court. The District Munsif overruled them all. She then went on appeal to the Subordinate Judge, who disposed of two of her contentions, including this one that execution was barred by S. 48 of the Code, and dismissed her appeal. She has therefore come to this Court on second appeal.

The contention before us is that in execution proceedings, if the judgment-debtor dies while the proceedings are pending, no legal representative of the judgment-debtor can be brought on record in those proceedings, but a new execution petition has to be presented. It is urged that in the Code there is no procedure for adding the legal representative of a judgment-debtor in the course of an execution petition. If that is so, then Ramachandrayya's widow could not be added in E.P. No. 125 of 1924, which was launched against Ramachandrayya himself, and by the time the application was made to take proceedings against the widow in E.A. No. 543 of 1924, it was too late to start a new execution petition because 12 years from the date of the decree had elapsed. It will be seen therefore that, unless the decree-holder is entitled, when his judgment-debtor dies in the course of execution proceedings, to bring on record the judgment-debtor's legal representative in the execution proceedings already initiated, the decree-holder in this case must fail.

It may be noticed that the general principles of the Code of Civil Procedure are that, if a party can take proceedings against another person and that person dies, the remedy does not lapse but proceedings may be taken against the dead person's representative. Section 146 of the Code lays down that

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him"

So far as suits are concerned, some of course lapse with the death of the defendant, and the right of suit does not survive; but in the majority of cases this is not so. And, if a decree has been made, section 50 of the Code provides:

"Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased"

In such cases the personal remedy is gone, but the remedy against the judgment-debtor's estate remains. Now it cannot be denied, I think, that the practice in the Courts of this Presidency—and, I believe, of the rest of India—for many years has

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been to allow legal representatives of deceased judgment-debtors to be brought on record in subsisting execution petitions and to allow those petitions to be prosecuted against the estate of the judgment-debtors represented by the legal representatives so brought on. But it is urged for the appellant, Ramachandrayya's widow, that the only machinery provided by the Code for bringing legal representatives on the record is to be found in O. 22. Rules 3 and 4 of that Order provide for bringing on record representatives of plaintiffs or defendants who die in the course of a suit in order that the suit may be prosecuted by or against the representatives to a finish; and R. 11 of that Order applies that procedure to appeals. Then at the end of the Order there is R. 12, which says that nothing in Rr. 3 or 4 shall apply to execution proceedings. As Mr. Satyanarayana Rao has pointed out for the appellant, those rules were considered by Coutts Trotter, Chief Justice and Curgenven, J., in *Palaniappa Chettiar* v. *Valliammai Achi*,[1] in which they decided that the legal representative of a decree-holder who has died during the pendency of an execution petition filed by him cannot be substituted in his place in the execution petition and be allowed to continue it, but that he must start a new execution petition if that is available. That result was reached by the learned Judges by interpreting the rules of O. 22. As I have said, it is in conflict with the long-established practice of the Courts of this Presidency; and it will be seen that the decision involves some very awkward, inconvenient and even unjust consequences. If an execution petition is in progress and an attachment has been made and then the judgment-debtor dies, according to the principle adopted in *Palaniappa Chettiar* v. *Valliammai Achi*,[1] that petition comes to an end and the attachment must go. The accident that the judgment-debtor has died may therefore throw a most serious obstacle in the way of a diligent decree-holder. In the same way persons who have come into those execution proceedings for rateable distribution in a proper way may be entirely defeated. And, if the decision is pressed to its logical conclusion, when a judgment-debtor dies during the pendency of execution proceedings which have been taken on appeal or second appeal, the result will be that the whole proceedings fall to the ground and even at that late stage a new execution petition has to be started. It happened that soon after the decision in *Palaniappa Chettiar* v. *Valliammai Achi*,[1] the question whether it could be extended to appeals in execution matters came

1. (1926) I.L.R. 50 Mad. 1: 51 M.L.J. 745.

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before Wallace and Tiruvenkatachariar, JJ., in *Sundayee Ammal* v. *Krishnan Chetty*[2]; and, although they did not definitely say they disagreed with the decision in *Palaniappa Chettiar* v. *Valliammai Achi* [1] they indicated, if I may say so with respect, something very like it, and at any rate they refused to extend its principle to appeals in execution matters. And again, in cases such as the one before us, if a decree-holder were properly and legally prosecuting the execution of his decree by a petition put in near the end of the 12 years allowed by section 48 of the Code, then by the accident of the judgment-debtor dying a day after the 12 years expired he for no fault of his own would be entirely defeated. Those are very curious results to my mind—unreasonable and unjust results. It is not clear whether they were before the minds of Coutts Trotter, C.J. and Curgenven, J., when they decided *Palaniappa Chettiar* v. *Valliammai Achi*.[1]

Now is there any reason why legal representatives should not be brought on record in execution petitions? No reason has been suggested in the arguments before us, no justification for making the law in that way. If that is the law, what has been suggested for the appellant in effect is that it is a strange eccentricity of the Legislature: R. 12 of O. 22 of the Code has made it so in spite of the principles of the Code expressed in Ss. 50 and 146. That is very curious, if it is so. If it was the intention of the Legislature to enact that in execution proceedings legal representatives should never be brought on record, but that, when a judgment-debtor or a decree-holder died, new execution petitions should always be started, one would have expected that very important provision to be put into the body of the Code itself. There is nothing of the sort in the body of the Code; but this rule which it is suggested has that effect is to be found in Sch. I, which contains rules subject to amendment by the various High Courts of the country. Indeed, speaking for myself, if I thought that R. 12 of O. 22 really had the effect that has been suggested, I should not hesitate to propose that this Court should with the consent of the Local Government amend it, as would be within our powers.

But, if we examine O. 22, do these rules really have the effect that is suggested? Rule 12 runs:

"Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

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1. (1926) I.L.R. 50 Mad 1: 51 M.L.J. 745.
2. (1928) I.L.R. 51 Mad. 858: 55 M.L.J. 497.

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Now it will be seen that the rule does not say that legal representatives shall never be brought on record in execution proceedings. If that was meant, I do not understand why it was not so stated directly. What R. 12 does say is, so far as we are concerned with it, that nothing in Rr. 3 and 4 of the Order shall apply to proceedings in execution of a decree or order. What is it that R. 4, with which we are more immediately concerned in this case, says? It provides that, when a defendant dies in the course of a suit and the right to sue survives, the Court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit; and then in sub-rule (3) comes an important provision—

"Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant";

and, as we know, the time allowed by law is very brief, only 90 days. Rule 3 contains similar provisions relating to the death of the plaintiff. Well, R. 12 says those provisions shall not apply to execution proceedings. What is the result of that? If we take R. 4 and R. 12 together in their literal meaning, it amounts to this: if instead of a defendant dying in the course of a suit a judgment-debtor dies while an execution petition against him is pending, then the provision in R. 4 that on an application the Court is bound to bring the legal representative of the deceased person on record does not apply; and it also means that, if no application is made to bring a legal representative on record within the time allowed, the provision that the proceedings abate does not apply. That is the literal meaning of saying that R. 4 does not apply to execution proceedings. I think, if we examine the matter, it is not unreasonable that the rules in regard to suits should be different from the rules in regard to execution. If a suit is going on in a Court, the Court is interested in seeing that that suit is disposed of promptly, both for the sake of its own business and out of fairness to other parties concerned. It is reasonable that, if a defendant dies and the right to sue survives, the plaintiff should be required under a penalty to make up his mind promptly whether he is going to continue to trouble the Court with that suit. It would be unreasonable that the suit should be left for a very long time pending on the Court's file while the plaintiff made up his mind what he was going to do about it, having already launched it. But, when we come to execution proceedings, after a decision has been given between the parties and a decree has been made, the Court is not interested in urging the decree-holder to press

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on with his execution. It matters nothing to the Court if the decree-holder takes the full time allowed by law for his execution proceedings or drops them altogether. There is no reason to introduce a provision that, if a decree-holder does not execute his decree promptly, the whole execution shall abate and he shall lose his decree. There would be no object in such a provision. Nor is it really necessary that there should be such a provision even in regard to any particular execution petition. If the decree-holder applies to execute the decree by arrest and the judgment-debtor dies, that matter is finished. If he applies to execute by attachment and sale and the judgment-debtor dies, and the decree-holder is dilatory and does not do anything in the way of proceeding with his execution petition, it is always open to the Court to say that he is in default and to raise the attachment. Apart from that the fact that he does not prosecute his execution petition does not inconvenience or trouble any one. So that, although it is perfectly reasonable that there should be penalties provided by our procedure to make plaintiffs prosecute their suits promptly, even if a defendant dies, by taking steps to bring the legal representative on record subject to a very severe penalty if they do not take those steps with promptness, there is no necessity for such a procedure in regard to execution proceedings. In that view of the matter Rr. 3 and 4 of O. 22 of the Code are not necessary for execution proceedings and are not really suitable to them; and I think it extremely probable that is why the Legislature provided in R. 12 of O. 22 that they should not apply to execution proceedings.

It has been asked by Mr. Satyanarayana Rao, if Rr. 3 and 4 of O. 22 do not apply to execution proceedings, where is the machinery for bringing the legal representatives on record at all in execution proceedings? He suggests that it is only because there is machinery provided in O. 22 that legal representatives can be brought on record in suits and appeals, and that, if that machinery is absent so far as execution proceedings are concerned, then there is no means of bringing legal representatives on record in them. But is it right to assume that explicit machinery must be provided by the Code for bringing legal representatives on record? If Rr. 3 and 4 of O. 22 were not there, would it follow that no legal representatives could be brought on record in suits or appeals? We have to remember that there is S. 146 of the Code, which provides the principle. Supposing for a moment that Rr. 3 and 4 of O. 22 were not there, in the face of S. 146 could we assume that, if a defendant died in the course of a suit, the only thing that a plaintiff could do would

be to start a new suit, which might well be time-barred then? Would that be the result? Surely the Courts are not so helpless as that. As Mr. Justice Kumaraswami Sastri said in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*,[3]

"Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of section 151 is to give such power to Courts and to prevent a failure of justice"

I think the correct view is that, if Rr. 3 and 4 of O. 22 were not there, still, if a defendant died and the right to sue survived, the plaintiff could bring on record the legal representative of the defendant, and we should have to let him do so. Otherwise we should be denying him his legal remedy. But in the absence of those rules he would have three years for doing it under Art. 181 of the Limitation Act. That would be very inconveniently long; and for that reason Rr. 3 and 4 of O. 22 have been enacted to ensure that such a long time is not occupied but that, if legal representatives are to be brought on record, they are brought on record promptly subject to the penalty of abatement when that is not done. Indeed it may be said that those rules do not create the right to bring legal representatives on record but penalise those who do not exercise that right promptly.

But it is a fact that the learned Judges in *Palaniappa Chettiar* v. *Valliammai Achi*[1] took a different view of the position, as they said in effect that R. 12 of O. 22 settled the matter, and without going further into it they decided that the practice of our Courts long in vogue was illegal. But, if I may say so with great respect, I doubt whether they examined the actual wording of R. 12 with sufficient care. They said:

"By R 12 this rule (that is R 3) is expressly rendered inapplicable to execution proceedings, an expression of intention on the part of the framers of the rules so clear that it is really unnecessary to look further";

and therefore they did not look into the consequences nor consider the existing practice nor refer to the earlier cases on the subject. It is possible that certain important cases were not brought to their notice; at any rate they are not mentioned in their judgment. But with all respect I cannot agree with their view of the actual wording of R. 12. It does not lay down that no legal representative shall be brought on record in execution

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1 (1926) I.L R. 50 M. 1: 51 M.L.J. 745.
3. (1921) I.L.R. 44 M. 919: 41 M.L.J. 316 (F.B.).

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proceedings but merely states that nothing in Rr. 3, 4 and 8 of that order shall apply to execution proceedings The meaning attributed to R. 12 by the learned Judges is not explicitly expressed in it nor, as far as I can see, necessarily implied in it.

One of the important cases not mentioned by the learned Judges is *Purushottam* v. *Rajbai.*[4] That was a case dealing with the Code of 1882. It was the view of the Bombay High Court that the sections of that Code which correspond with the rules now in O. 22 were not applicable to execution proceedings. Nevertheless in that case the learned Bombay Judges, holding the view that those sections were not applicable to execution proceedings, laid down that in an execution petition, if the judgment-debtor died, his legal representative could be brought on record, the very point before us. *Bhagwan Das* v. *Jugul Kishore*[5] is perhaps an even more interesting case because it deals with the present Code. There again in spite of R. 12 of O. 22 having stated that nothing in Rr. 3 and 4 shall apply to execution petitions, the learned Judges of the Allahabad High Court decided that there was still a power in the Court to bring on record the legal representative of the deceased judgment-debtor in the course of an existing execution petition. And a similar view was expressed by two learned Judges of the Calcutta High Court in *Monmotho Nath Mitter* v. *Rakal Chandra Tewary*[6] in respect of a decree-holder dying in the course of an execution petition. That is a case which would have been of even more interest to the learned Chief Justice and Curgenven, J.. if it had been brought to their notice in the argument in *Palaniappa Chettiar* v. *Valliammai Achi.*[1] With the greatest respect it appears to me that the value of the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[1] cannot but be affected by the fact that those earlier decisions were not noticed. However we are not dealing with exactly the same question here as was before the learned Judges in *Palaniappa Chettiar* v. *Valliammai Achi*[1] though the principle of their decision would apply to this case. That case, as I have said, concerned a decree-holder. He was actually a transferee decree-holder, who died in the course of execution proceedings, and the question was whether his legal representative could be brought on to continue the same execution petition. Here we are dealing with a slightly different question, whether, when a judgment-debtor dies in the course of execution proceedings, his legal representative can be brought

1. (1926) I.L.R. 50 M. 1 51 M.L J. 745
4. (1909) I.L.R. 34 B 142. 5 (1920) I.L.R. 42 A. 570.
6. (1909) 10 C.L.J. 396

on record in those very execution proceedings. As I have mentioned, Wallace and Tiruvenkatachariar, JJ., in *Sundayee Ammal* v. *Krishnan Chetty*[2] were not prepared to press the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[1] to its logical conclusion so far as appeals in execution matters were concerned. But we get much nearer to the question now before us in the opinion expressed by Wallace and Madhavan Nair, JJ., in *Ramanathan Chettiar* v. *Ramanathan Chettiar*.[7] There they definitely express the opinion that the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[1] could not be applied to judgment-debtors. And Jackson, J., sitting alone, in C M S.A. No. 140 of 1928 expressly refused to apply *Palaniappa Chettiar* v. *Valliammai Achi*[1] to the case of a judgment-debtor As he remarked in that case, the Privy Council have given us guidance in this matter in *Jang Bahadur* v. *Bank of Upper India, Ltd.*[8] It is there remarked:

> "If the judgment-debtor dies before any such certificate is issued the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death But before execution can proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree."

There is an indication that in the view of the Privy Council substitution of the legal representative for a deceased judgment-debtor is possible, and, as I understand the passage, substitution in an existing execution petition. Now, three learned Judges of this Court having dissented from the principle of *Palaniappa Chettiar* v. *Valliammai Achi*[1] and their dissent appearing to be supported by the opinion of their Lordships of the Privy Council, I do not think we need feel ourselves bound by *Palaniappa Chettiar* v. *Valliammai Achi*[1] in this case. That being so, in my opinion there is no doubt that Ramachandrayya's widow could properly be brought on record as his representative in E.P. No. 125 of 1924, which was presented within 12 years of the date of the decree, and therefore section 48 of the Code, which bars fresh applications for execution made more than 12 years from the date of the decree, is no obstacle in the decree-holder's way.

As I have said, there were other objections to the execution of the decree raised by Ramachandrayya's widow before the Lower Courts. Her objection that the previous execution petitions had not been in accordance with law has not been press-

1. (1926) I L.R 50 M. 1 51 M L J 745
2 (1928) I L R. 51 M 858 55 M L J. 497
7. (1928) 30 L.W. 995.
8 (1928) L.R. 55 I A. 227. I.L.R. 3 Luck. 314 55 M.L.J. 545 (P.C).

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ed before us. The learned Subordinate Judge thought it unnecessary to go into what he called "the merits of the case," as he was of opinion that, when the District Munsif brought the widow on record as Ramachandrayya's legal representative before making his final order and she did not appeal against that, her present contentions became *res judicata* against her, a view which cannot be supported, and that S. 128 of the Transfer of Property Act could be applied in these proceedings, which contention is not pressed for the decree-holder before us. By "the merits" the learned Subordinate Judge apparently referred to the widow's contention that she had received the property concerned by a gift from Ramachandrayya in 1910. The decree-holder maintained that that gift was a sham transfer. The learned Judge has not decided that question. It is not enough merely to bring Ramachandrayya's widow on record as his legal representative: the decree-holder has to make out his right to proceed against the property as part of Ramachandrayya's estate. Therefore, although I do not agree with the contention urged for the appellant here, it appears to me necessary that this execution petition should go back to the Subordinate Judge for fresh disposal on the remaining question, whether the property concerned is Ramachandrayya's property, that is, part of his estate. I therefore propose that the order of the learned Subordinate Judge be set aside and the appeal before him be remanded to him for fresh disposal and that the costs of this appeal should abide and follow the Subordinate Judge's decision.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree. As this case raises a question of importance, I directed, when it came on for hearing before me, that it should be posted before a Bench. I should like to add a few words of my own, having regard to the importance of the question.

After obtaining a money decree in O.S. No. 179 of 1912, the decree-holder filed several petitions for execution of the decree. The last of such execution petitions with which we are now concerned here was filed on the 18th February, 1924—the date of the decree being 29th February, 1912. The judgment-debtor having been absent from the country and not having been heard of for 8 or 9 years, the decree-holder applied to have his legal representative—his widow—brought on the record with a view to proceed with his main execution petition. When he made that application on 5th July, 1924, more than 12 years had elapsed from the date of the decree; the legal representative of the judgment-debtor raised the objection that execution of the

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decree was barred by virtue of the provisions of S. 48 of the Code of Civil Procedure. It was also argued on behalf of the legal representative that in such circumstances the proper procedure that the decree-holder should adopt was to file a fresh execution petition, and that it was not open to him, in the course of the execution petition that was pending, to apply for orders regarding the substitution of the legal representative of the judgment-debtor. In support of this contention, the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[1] was relied on. The Lower Courts, however, decided against the contention of the legal representative of the judgment-debtor, and allowed execution to issue on the ground that the question was *res judicata* by virtue of a prior order against which no appeal had been preferred by the judgment-debtor's legal representative. Therefore this Civil Miscellaneous Second Appeal has been preferred by the legal representative of the judgment-debtor.

I may at once state that the Lower Appellate Court's view that the question is *res judicata* has not been sought to be supported before us (and, in my view, quite properly) by the learned advocate for the respondent. I proceed to consider the two main contentions raised by the appellant. It will be convenient to take the second contention first.

The second of the two main contentions that were raised before us is based on the decision of this Court in the case reported in *Palaniappa Chettiar* v. *Valliammai Achi*[1]; and though that case related to the death of the decree-holder, and not, as is the case before us, of the judgment-debtor, yet as many of the arguments applicable to the case of the death of a decree-holder would have weight in considering the decision of a similar question arising in the case of the death of a judgment-debtor, we were anxious to consider how exactly the matter stands, having regard to the provisions of the Code and to the decisions of Courts here and elsewhere. Before proceeding to discuss the question further, I may mention that the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[1] worked a very important change in the practice which was till then prevailing here, having regard to the consequences of that decision so far as the legal representative of the decree-holder was concerned. If the only remedy open to the legal representative of a deceased decree-holder in such a case be to file a fresh execution petition, then fresh pleas of limitation might be open to the judgment-

1. (1926) I.L.R. 50 M. 1: 51 M.L.J. 745.

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debtor, the intervening period affording him basis for such contention. Attachments which were effected pending the prior execution petition would *prima facie* no longer be available when a fresh execution petition is filed. The advantage which a decree-holder has, as a result of his having filed execution petition, such as the right to share in the proceeds of auction sales held by the same Court after the filing of such execution petition, might not be necessarily available to him on such fresh execution petition. Other disadvantages to the decree-holder's representative also could be readily imagined, so that the decision in *Palaniappa Chettiar* v. *Valliammai Achi*[1] did not only affect the practice as it prevailed till then, but also substantially affected the right of the legal representative of the decree-holder. All the same, if such results necessarily or properly follow from the provisions of the Code, then, any remedy to avoid such results should be sought elsewhere. In *Palaniappa Chettiar* v. *Valliammai Achi*[1] the learned Judge sitting on the Original Side of this Court had an execution petition pending before him. When such petition was pending, the decree-holder died and an application was made to have the deceased decree-holder's legal representative brought on the record. The learned Judge passed orders substituting the name of the legal representative in the place of the decree-holder, with a view to proceed further with the execution petition that was pending. The matter was taken on appeal by the judgment-debtor. The two learned Judges, before whom the appeal came, reversed the trial Judge's order and held that it followed from the provisions of O. 22 of the Code of Civil Procedure that the only remedy open to the legal representative of a decree-holder in such circumstances was to file a fresh execution petition. The grounds on which the judgment was based appear at page 4 of the report. In answer to the contention that under S. 146 and under O. 22, R. 16 it was open to a person on whom rights devolved by operation of law, etc., to take steps to carry on further proceedings, their Lordships observed as follows:

"At the same time we do not accept the argument that because this rule (O. 21, R. 16) lays one method of proceeding with execution it excludes any other method. For an answer to the question raised, it is necessary to go to O 22, which relates to death, marriage and insolvency of parties. Rules 3 and 4 of this Order respectively provide for the substitution during the course of a suit of the legal representative for a deceased plaintiff or a deceased defendant; and construing the word 'suit' so as to embrace execution proceedings, R. 3 would furnish the required authority. By R. 12, however, this rule (with two others) is expressly rendered inapplicable to

1. (1926) I.L.R. 50 M 1: 51 M.L.J. 745.

execution proceedings, an expression of intention on the part of the framers of the rules so clear that it is really unnecessary to look further."

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Holding therefore that the case before the Court was specifically dealt with in Rr. 3 and 4 of O. 22 and that section 146 of the Code of Civil Procedure could not apply to such a case, the Court came to the conclusion that it was not open to the legal representative of the decree-holder to apply to have his name substituted in the place of the deceased decree-holder in the execution petition already pending.

I have quoted the material portion of the judgment of the Court, and I gather that the basis of the decision is R. 12 of O. 22 read with Rr. 3 and 4. Turning to Rr. 3, 4 and 8, what one finds is that the Legislature has provided for abatement of *suits* if the plaintiff who is *dominus litus* in such matters should not proceed to take steps to bring the legal representative of a deceased defendant or a deceased plaintiff, as the case might be, within the time allowed by law. The suit is declared to have abated with reference to the deceased parties. Now to declare that a suit abates wholly or in part is to impose a penalty upon a person for not taking steps which the law requires him to take in proper time. Order 22, R. 12, as I read it, only declares that the Legislature did not think it proper to impose upon decree-holders this penalty, and I am not able to gather anything further from the provisions of O. 22. One may recall to one's mind several rules of practice which are made applicable to suits, but which are not applicable to execution petitions. It is not necessary for me to elaborate on this matter. If a plaintiff should not appear on the date fixed for the hearing of his suit, then the suit is dismissed. It is not open to him to file a fresh suit except under particular circumstances. His ordinary remedy is to have the old suit restored to the file and to have the relief prayed for therein granted to him in that suit. But in the case of execution petitions, greater latitude has been, for obvious reasons, allowed to a decree-holder. A decree-holder who does not promptly and expeditiously carry on proceedings in execution but allows his petition to be dismissed because proper steps have not been taken by him is not thereby denied, the relief claimed for, for all time. He is, subject to question of limitation which I am not considering here, entitled to file a fresh execution petition seeking the same reliefs. As I said, there are also other rules of procedure applicable to suits but not applicable to execution petitions. These rules have been recognised by Indian Courts long prior to the enactment of O. 22, R. 12 in the Code of 1908. It has been laid down that,

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though a decree-holder has, just like a plaintiff, the *right* to have the legal representative of the deceased judgment-debtor substituted in the original execution petition and to go on with the same till complete effectual relief is afforded to him in execution, he is not *bound* to do so, and that principle of abatement does not apply to execution petitions. In fact, that disability is not cast on decree-holders in respect of execution petitions; but decree-holder's legal representatives are given an option, of which they may avail themselves or not, in the circumstances. To construe that O. 22, R. 12 casts an obligation on the decree-holders in such circumstances and practically applies to them the principle of abatement—(with the only difference that the filing of a fresh execution petition is allowed)—would, I think, work a great change in the procedure relating to execution of decrees as it was understood at the time when the new Code was passed; and, in the absence of definite indication on the part of the Legislature making such an intention clear, I do not think we would be justified in inferring that that was the intention of the Legislature.

Now, this question, namely, how far the doctrine of abatement applied to execution petitions and whether on the death of a judgment-debtor or a decree-holder pending an execution petition, applications are maintainable for the substitution of the legal representative of the deceased, came for consideration before the Courts in India long before the Code of 1908. The earliest case relating to the death of a decree-holder would seem to be the case in *Gulabdas* v. *Lakshman Narhar*[9] referred to in *Bhagwan Das* v. *Jugul Kishore.*[5] Two cases relating to the death of judgment-debtors during the pendency of execution petitions were brought to our notice. In *Purushottam* v. *Rajbai*[4] the learned Chief Justice of the Bombay High Court and Batchelor, J., had a case where the judgment-debtor died before execution of the decree was completed. They held that, when execution proceedings were commenced against the judgment-debtor, they could be continued after his death by substituting the name of the legal representative in the place of that of the deceased judgment-debtor in the execution petition, and that it was not necessary to file a fresh execution petition under the provisions of S. 235 of the prior Code. They remarked at page 151 that an earlier case quoted before them decided "that sections 361 to 372 of the Code did not relate to execution

4. (1909) I.L.R. 34 B. 142 5. (1920) I.L.R. 42 A. 570 at 573.
9. (1879) I.L.R. 3 B 221.

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proceedings." After discussing the matter further they observed:

"We think therefore that there is no objection to the continuance of the execution proceeding against the present respondent without fresh application under section 235."

Thus, it is clear that, even before the Legislature enacted under O. 22, R. 12 that the provisions of Rr. 3, 4 and 8 do not apply to execution proceedings, Courts had decided that the corresponding provisions of the prior Code did not apply to execution proceedings, and in spite of the same, Courts have exercised their jurisdiction in the matter by allowing the name of the legal representative to be substituted in the place of the deceased party in the original execution petition, and by directing that the proceedings in execution should proceed further, and that it was not necessary to file a fresh execution petition.

After the Code of 1908, the question was raised before the Allahabad High Court in the case reported in *Bhagwan Das* v. *Jugul Kishore.*[5] There, after the attachment of the judgment-debtor's property in execution of a money decree, the judgment-debtor died. The Court held that the decree-holder was not bound, on peril of his execution petition abating, to bring upon the record the legal representative of the judgment-debtor and that, so long as the execution of the decree was not barred by limitation, he could execute it against the legal representative of the deceased judgment-debtor. The learned Judges went further and added:

"On the other hand, there is no bar to the decree-holder, if so advised, in applying to have the legal representative made a party to the execution proceedings."

It should be noticed that in the case of a suit it is obligatory on the plaintiff or his legal representative to file the necessary application in time to avoid abatement, and it is not open to him to file a fresh plaint. In the case of execution petitions, the Court held in *Bhagwan Das* v. *Jugul Kishore*[5] that while it was open to the decree-holder to apply in the pending execution petition to have the legal representative's name substituted, it was also open to him, if he was so advised, and if there be no bar of limitation, or any other bar, to drop the pending proceedings and to file a fresh execution petition. At page 572 the learned Judges observed:

"Rule 12 distinctly shows that this rule shall not apply to execution proceedings, that is, that it is not compulsory upon a decree-holder to have the names of the heirs brought upon the record in that way, on penalty of his

5. (1920) I.L.R. 42 A. 570.

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decree abating It is open to him to apply under section 50 of the Act for execution of his decree as against the heirs. But there is nothing in the Code of Civil Procedure which lays it down that a Court cannot bring the heirs of a judgment-debtor upon the record in execution proceedings and continue with them, nor is there anything in the law which lays it down that on the death of the judgment-debtor any pending execution proceeding shall abate."

They added later on:

"It is nowhere held that execution proceedings must abate on the death of the judgment-debtor. If the decision of the Court below be correct, then, on the abatement of these proceedings, the attachment would cease and it would be open to the heirs to dispose of the property before it could be re-attached under a fresh execution proceeding."

The matter was considered by the Calcutta High Court in the case reported in *Monmotho Nath Mitter* v. *Rakal Chandra Tewary*.[6] I should like to quote one or two sentences from the judgment of Mookerjee, J., in that case at page 399. A preliminary objection was taken before the learned Judge that upon the death of the applicant, her legal representatives were not entitled to prosecute the appeal; and, in support of that proposition, reliance was placed upon O. 22, R. 12 of the Code. The learned Judge characterised the objection in the following terms:

"This preliminary objection is of a somewhat novel character and would not be worthy of serious consideration but for the insistence with which it has been pressed."

The learned Judge, after stating that even before the enactment of the present Code, Courts had held that the corresponding provisions of the prior Code did not apply to execution proceedings and that Courts had power to bring the legal representatives of deceased decree-holders and judgment-debtors on record in pending execution petitions, observed that "the effect of R. 12 of O. 22 does not in any way nullify that practice." The Privy Council in the case reported in *Jang Bahadur* v. *Bank of Upper India, Ltd.*[8] had occasion to note the practice in such matters. At page 233 in Vol. 55, Indian Appeals, their Lordships observed as follows:—

"If the judgment-debtor dies before any such certificate is issued (certificate as regards complete satisfaction of the decree), the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction."

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6. (1909) 10 C.L.J. 396.
8. (1928) L.R. 55 I.A. 227 at 233: I.L.R. 3 Luck. 314: 55 M.L.J. 545 (P.C.).

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The passage quoted from *Jang Bahadur* v. *Bank of Upper India*[8] would seem to lay it down as clear law that execution proceedings do not abate by reason of the death of any of the parties to the same, and also that in the case of death of the judgment-debtor during the pendency of the execution petition the decree-holder must get "an order for substitution" from the proper Court. This is clearly against the contention that in such cases execution proceedings "abate" (or, as it was said "lapse" or "in any other way become infructuous"), and that the only remedy open to the decree-holder in such circumstances is to file a fresh petition for execution.

It further seems to me that certain observations made by Sir John Wallis, C.J. and Kumaraswami Sastri, J., in the Full Bench case, *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[3] furnish answers to the contentions raised before us by Mr. P. Satyanarayana Rao, the learned advocate for the appellant. At page 924 this is what the learned Chief Justice says:

"It (the Code) expressly provides by O 22, R. 12 that nothing in Rr 3, 4 and 8 of that Order, which provide for abatements, shall apply to execution."

I take that to be a pronouncement (on a question on which there have been prior pronouncements of Courts to similar effect) that the doctrine of abatement does not apply to execution proceedings, and that is what is laid down in R. 12 of O. 22. If that be so, there is absolutely no ground for putting a construction on R. 12 which not only is contrary to the settled practice of Courts but which also involves at the same time serious consequences prejudicial to decree-holders. But the learned advocate for the appellant asked, what is the provision of the Code which would authorise the Court to pass "orders of substitution" in such cases? To that question, Mr. Justice Kumaraswami Sastri's opinion delivered in the Full Bench case contains the necessary answer. This is what the learned Judge says at p. 932:

"Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the Legislature has not made provision for a particular case, though within the generality of a section of the Code The object of section 151 is to give such power to Courts and to prevent a failure of justice."

As the Code gives a decree-holder the right to execute his decree till complete satisfaction is rendered if the circumstances

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3. (1921) I.L.R. 44 M. 919: 41 M.L J. 316 (F.B.).
8. (1928) L.R. 55 I.A. 227: I.L.R. 3 Luck 314: 55 M.L.J. 545 (P.C).

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of the judgment-debtor permit the same, (subject to the law of limitation and some other provisions enacted in this behalf), it is open to the decree-holder to seek the assistance of the Court in all matters in which such assistance is necessary to give him the benefit of the complete realisation of his decree; and if the Court finds that no specific provisions exist in the Code in respect of any contingency that might happen, it is open to the Court to mould its procedure according to the equities of the case. It therefore seems to me that having regard to the principles applicable to the case, the prior practice, and the decisions of the various Courts on this question, one should avoid the consequences which would follow if we accept the appellant's contention, if it be legitimately possible to do so. I am glad that, after elaborate and learned arguments that were addressed to us by the learned advocates in this case, materials have been placed before us which enable us to answer the question in a way which would avoid injustice.

Having said so much with reference to the general principles applicable to procedure applicable to execution, I proceed to note that our attention was drawn to a decision in *Sundayee Ammal* v. *Krishnan Chetty*[2] by Mr. Justice Wallace and Mr. Justice Thiruvenkatachariar, where the applicability of *Palaniappa Chettiar* v. *Valliammai Achi*[1] to an execution appeal was raised. As I read the judgment of the learned Judges, they apparently did not feel quite sure about the ground on which *Palaniappa Chettiar* v. *Valliammai Achi*[1] was based, but they thought that, for disposal of the matter immediately before them, it was enough to express the opinion that they would not be prepared to extend the principle of the decision in *Palaniappa Chettiar* v. *Valliammai Achi.*[1] But the matter came again before Mr. Justice Wallace and Mr. Justice Madhavan Nair in *Ramanathan Chettiar* v. *Ramanathan Chettiar.*[7] It is said that the observations made by the learned Judges in that case were not strictly necessary for the decision of the case. But they were making observations on a question of practice, and, for my part. I attach great weight to pronouncements from learned Judges on matters of procedure. Now, at pp. 1004 and 1005 in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[7] there are passages in the judgment from which it is clear that the learned Judges were not

1. (1926) I.L.R. 50 M 1: 51 M.L.J. 745.
2 (1928) I L.R. 51 M 858: 55 M.L.J. 497.
7. (1928) 30 L.W. 995.

prepared to accept the soundness of the principle laid down in *Palaniappa Chettiar* v. *Valliammai Achi.*[1] They observed:

"The Court has clearly jurisdiction to go on with the execution proceedings and to receive an application to bring on necessary parties if such are necessary. Does then the death of original judgment-debtor during the pendency of the execution proceedings entail in law the issue of a fresh notice to his legal representatives?"

After discussing the question further, they expressed their view in the following terms:—

"It is obviously not the law that the moment the judgment-debtor in an execution petition dies, the Court loses jurisdiction in the matter, and the execution petition collapses"

These observations related to the death of the *judgment-debtor*, pending the execution petition, and therefore are exactly applicable to the case before us. Mr. Justice Jackson sitting as a single Judge also expressed similar views in C.M.S.A. No. 140 of 1928.

Having regard to these later pronouncements made by learned Judges of this Court, to the previous law and practice relating to such important matter as proceedings in execution of decrees, to the opinions expressed by learned Judges of Bombay, Allahabad and Calcutta, with no course of decisions contra in our Court, and, finally,—(and this should by itself be conclusive of the question)—having regard to the passages quoted from the decision of the Privy Council in *Jang Bahadur* v. *Bank of Upper India, Ltd.*[8] I think that we should not be justified in reading O. 22, R. 12 in the way we are asked to do by the learned advocate for the appellant.

The other main contention raised by the learned advocate for the appellant that the application in question filed in the execution petition is barred under the provisions of section 48 of the Code, in my opinion, also fails, because section 48 of the Code would apply only when a *fresh* execution petition has to be filed, and not when an execution application is made in a pending execution petition. (The rules framed by this High Court draw a distinction between an Execution Petition (E.P.). and an Execution Application (E.A.), the latter term being applied to the media by which further and other steps are sought to be taken in the main matter of execution and in a pending execution petition). I therefore overrule the main contentions raised by the learned advocate for the appellant.

I also agree with my learned brother that the decision of the Lower Appellate Court on the question of *res judicata* is

1 (1926) I.L.R. 50 M. 1: 51 M.L.J. 745

8. (1928) L.R. 55 I.A. 227: I.L.R. 3 Luck 314: 55 M.L.J. 545 (P.C).

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not sustainable in the circumstances, and that the appeal must be remanded to the Lower Appellate Court for fresh disposal. I also agree in the order as to costs proposed by him.

B.V.V. *Appeal remanded.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD BLANESBURGH, LORD MACMILLAN AND SIR GEORGE LOWNDES.

Moulvi Zahir-ul-Said Alvi .. *Appellant**

v.

R. S. Seth Lachhmi Narayan .. *Respondent.*

P. C. — Moulvi Zahir-ul-Said Alvi v. Seth Lachhmi Narayan

Consent judgment—Appeal to Privy Council not competent—Remedy of party when mistake alleged—Civil Procedure Code, 1908, *O* 20, *R.* 6—*Decree should on face of it recite consent*

A judgment and decree by consent of the parties cannot be challenged by way of appeal to the Privy Council † If a party alleges that there had in fact been no consent to the judgment and that the statement to that effect by the Court was a mistake, his proper remedy is to take the necessary steps in India to rectify the mistake

Having regard to the provisions of O. 20, R. 6 of the Civil Procedure Code, 1908, which requires that "the decree shall agree with the judgment," where a decree, or any part of a decree, is passed by consent of parties, it should always so appear on the face of the decree when drawn up.

Appeal No. 67 of 1929 from a decree, dated the 21st October, 1926, of the Court of the Judicial Commissioner, Central Provinces, setting aside a decree, dated the 28th August, 1924, of the Court of the District Judge of Hoshangabad.

The chief point for determination before the Board was, whether the parties having agreed to the terms of the decree appealed from, the appellant was entitled to challenge that decree.

Abdul Majid for appellant submitted that there was no consent given to the judgment, and that the decree as drawn up did not show that it was passed by consent.

[LORD BLANESBURGH observed that the judgment on the face of it recited the consent of the parties.]

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*P.C. Appeal No. 67 of 1929. 5th February, 1931.

†Compare section 96 (3), Civil Procedure Code, "No appeal shall lie from a decree passed by the Court with the consent of parties."—*K J.R.*

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De Gruyther, K.C. and *Parikh* for respondents were not called upon.

5th February, 1931. Their Lordships' judgment was delivered by

SIR GEORGE LOWNDES.—This appeal was heard in November last and their Lordships took time to consider the form in which their humble advice should be tendered to His Majesty.

It appeared at the hearing that the final judgment delivered by the Judicial Commissioners, before whom the case came in appeal, was a judgment by consent of the parties, and their Lordships enquired of Counsel appearing for the appellants how, in face of this fact, he could ask the Board to interfere. Counsel did not then contest the consent, but contended that a point which had been the subject of decision at an earlier stage of the case was still open to him.

When the case was set down for judgment a fresh application was made to their Lordships in connection with this point, supported by an affidavit of the appellant which had been sent from India. In this it is alleged that there had in fact been no consent to the judgment above referred to, and that the statement to that effect by the Judicial Commissioners was a mistake.

The judgment was in the following terms:—

1. After considerable argument and some unavailing efforts to come to some settlement which would avoid future litigation, it is now agreed among the parties to this appeal that the foreclosure decree in favour of the plaintiff should cover the whole village of Urdhon, that defendant 1 should be allowed an opportunity to redeem in order to secure the payment of his charge on the income of the village, and that the amount of the charge cannot suitably be determined in this suit. Both parties agree that the decree of the Lower Court should be set aside and a decree on these lines substituted for it.

2. The only questions for the determination of this Court are the amounts which should be added to the Lower Court's decree on account of interest and costs. As regards interest the last ground in the memorandum of appeal has not been pressed, and the plaintiff-appellant and the first respondent have left the point to the discretion of the Court The principal amount was Rs. 5,000 advanced in 1908 and bore compound interest at 1½ per cent. per mensem The Lower Court has allowed only simple interest at 6 per cent per annum from the date of suit (15th September, 1920), to the last date fixed for redemption (28th February, 1925), and has given a decree for a sum of Rs 16,475-2-0, exclusive of costs. This amount has not been challenged, and we consider it fair to allow this sum, with further simple interest at 1 per cent per mensem on Rs 16,475-2-0 from 28th February, 1925 to 21st April, 1927, the date we now fix for redemption.

3 As regards costs, the efforts of defendant 1, first to defeat this mortgage entirely and then to establish a charge which would defeat it very largely, have been unavailing, and the plaintiff is entitled to add to the amount due on his mortgage the total of his expenses throughout this litigation. The defendant No. 1 must bear his own costs throughout.

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4. The decree of the Lower Court is set aside and a preliminary decree for foreclosure will be drawn up—

(1) against all five defendants;

(2) covering the whole of *mauza* Urdhon;

(3) for the amount permitted by paragraphs 2 and 3 above;

(4) fixing 21st April, 1927, as the last date for redemption;

(5) declaring that the village is subject to a charge of an unascertained amount held by defendant 1, Maulvi Zahirul Saheed Alvi.

Under ordinary circumstances their Lordships would not hesitate to take the statements contained in this judgment as correct, and would refuse summarily such an application as is now made to them. But the circumstances in the present case are peculiar.

It appears from the proceedings that the appeal was partly heard by the Judicial Commissioners on the 5th October, 1926 and then adjourned to the 13th "as there is a chance of a compromise." It came before the Court again on the last-mentioned date when, as appears from the fly-sheet, the attempted compromise broke down. Judgment was then reserved. The record discloses nothing except the judgment set out above of the 21st October.

A formal decree of the same date was drawn up in the ordinary course which recites only the hearing of the 5th October, makes no reference at all to the 13th or to any consent of parties, but proceeds to set aside the decree of the lower Court and in lieu thereof passes a decree in conformity with the effective terms of the judgment.

The matter did not end here. On the 7th January, 1927, the present appellant applied to the Judicial Commissioner's Court for leave to appeal to His Majesty in Council against the decree of the 21st October, 1926. This was opposed by the respondent, but whether on the ground that the decree of the 21st October was by consent or not their Lordships do not know. All that the learned Judicial Commissioners say in deciding that leave to appeal should be granted is "as the other party chose to oppose the application, on grounds so untenable that they do not require to be mentioned, he must pay the costs of the applicant."

Thereafter on the 16th June, 1927, the respondent presented a memorandum of cross-objections to the same decree, and on the 15th August, 1927, a certificate was issued in the usual form under section 110 of the Civil Procedure Code.

The respondent did not proceed with his cross-objections, and in his printed case before the Board rested his defence to the present appeal solely on the ground that the decree appealed

from being by consent, was not open to challenge. Their Lordships have not thought it necessary to give the respondent an opportunity of answering the affidavit of the appellant at this stage of the proceedings.

Under these circumstances which their Lordships have characterised, not without reason, as peculiar, it is impossible for them to accept without further question the affirmation by the judgment of the Judicial Commissioners that the decree they were about to pass was a decree by consent of parties. If it was so in fact, it clearly could not be challenged by way of appeal, and the certificate should have been refused.

If the recital of consent was in some way erroneous, as the appellant now alleges, it is equally clear that no judgment upon the merits has been pronounced by the Court of the Judicial Commissioner, and the appeal must be reconsidered by them and dealt with in the ordinary way.

Under these circumstances their Lordships feel constrained, lest some injustice may unwittingly be done by them, to remit this appeal to the Court of the Judicial Commissioner, with a copy of the affidavit of the appellant, for consideration of the matter now raised and a report thereon.

If the learned Judicial Commissioner is able to report that the statements in the judgment of the 21st October, 1925, are, as their Lordships would in all ordinary cases assume, entirely correct, the appeal will be returned to this Board and disposed of by their Lordships in due course.

If however by some mischance a mistake has been made and no consent of parties was given, the appeal will be set down again in the Judicial Commissioner's Court and a proper judgment delivered and decree passed, and the Judicial Commissioner will so report to this Board. It will be open to either party to appeal against any new decree so passed, subject to the usual conditions governing appeals to His Majesty's Council, without filing a new record.

Their Lordships would in any case call the attention of the Judicial Commissioner to the provisions of Order 20, Rule 6 of the first schedule to the Civil Procedure Code, which requires that "the decree shall agree with the judgment." Their Lordships feel no doubt that where a decree, or any part of a decree, is passed by consent of parties, it should always so appear on the face of the decree when drawn up.

If the objection now urged by the appellant to the judgment of the 21st October, 1926, has any foundation in substance, it is

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clear that the proper steps should have been taken by him in India to rectify it. He must therefore pay, in any event, the costs of the present application. Any further costs incurred in India will be dealt with by this Board upon the report of the Judicial Commissioner. Their Lordships will humbly advise His Majesty that an order should be made in the terms of this judgment.

Solicitors for appellant: *Francis and Harker.*

Solicitors for respondent: *T. L. Wilson & Co.*

K.J.R. *Appeal remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN AND SIR JOHN WALLIS.

The Official Receiver .. *Appellant**

v.

P. L. K. M. R. M. Chettyar Firm .. *Respondents.*

P. C.
The Official Receiver v. P. L. K. M. R. M. Chettyar Firm.

Provincial Insolvency Act (V of 1920), S 53—Onus of proof—Indian Registration Act, 1908, Ss 32, 33—Validity of presentation—Presentation by executant—Endorsement by Sub-Registrar not conclusive

On an application preferred by the Official Receiver under S 53 of the Provincial Insolvency Act, 1920, to annul a transfer of property by the insolvent, the *onus probandi* is not on the transferee, but upon the Official Receiver, to establish that it was not a *bona fide* transaction and one for value, and was, in consequence, voidable as against him, the Receiver. *The Official Assignee of the Estate of Cheah Soo Tuan* v *Khoo Saw Cheow,* (1930) 60 M.L.J. 210 (P.C.), followed.

Where a document is presented for registration by an agent not authorised by a power of attorney, the registering officer has no jurisdiction to register it, but where the document is in fact presented for registration by a party executing the document, the registration is in order. Even if the endorsement by the Sub-Registrar purported to show an invalid presentation, there is nothing in the Act to prevent a person from showing that the endorsement made by the Sub-Registrar was inaccurate, and proving the real facts *Jambu Parshad* v *Muhammad Aftab Ali Khan,* (1914) L.R. 42 I.A. 22. I.L.R. 37 All 49. 28 M.L.J. 577 (P C), distinguished.

Appeal No. 6 of 1930 from a judgment and order of the High Court, Rangoon, dated the 11th April, 1929, allowing an appeal from an order of the District Judge of Hanthawaddy, dated the 17th September, 1928.

The main questions arising upon the present appeal were whether in the insolvencies of Maung Ba Than and Ma Ngwe Tin, his wife, the respondent firm was entitled to prove (as a

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*P.C. Appeal No. 6 of 1930 25th November, 1930.

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secured creditor) in respect of a debt of Rs. 30,000 secured by a registered mortgage, dated the 7th July, 1927, executed by both the said insolvents; also whether the said mortgage was validly registered. The District Court answered those questions in the negative, and the High Court in the affirmative.

Geoffrey Lawrence, K.C. and *Robert Leach* for appellant.

Dunne, K.C. and *A. M. Talbot* for respondents.

25th November, 1930. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from a judgment of the High Court of Rangoon by which the Court on appeal from the District Judge in Bankruptcy reversed the decision of the District Judge in a matter which arose in the separate bankruptcies of a man named Maung Ba Than and his wife, Ma Ngwe Tin, who were engaged in some kind of commercial enterprise (not very clearly defined) in Kyauktan. The husband and wife were separately adjudicated bankrupt on the 28th November, 1927, on the petition of a petitioning creditor, a moneylender, who, in his petition, called attention to an alleged mortgage by the debtors in July of the same year. Shortly afterwards the Official Receiver was appointed Receiver, and a subsequent application was made by him to declare fraudulent the mortgage in question. The actual application was made under section 53 of the Provincial Insolvency Act, 1920, which provided that

"Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the Receiver and may be annulled by the Court"

The attack was levelled on a registered mortgage made by a deed of the 7th July, 1927. In that mortgage the two debtors. reciting that they wish to repay all debts due to Chettyar, borrow the principal sum of Rs. 30,000 from the present respondent, P. L. K. M. R. M. Chettyar, on a mortgage of their own properties. Then the premises are set out, which consist of a certain number of acres of paddy land and some other land, and the mortgage recites that, if there be default with respect to payment they will be sold, and it winds up by saying: "We the debtors agree to this and agree to take a mortgage on the aforesaid properties." The deed purported to be signed by five witnesses, and it was registered. It is endorsed by the Sub-Registrar as presented by Maung Ba Than, the male debtor, for P. L. K. M. R. M. Chettyar, and then the debtor and his wife,

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the two debtors that is, admitted execution, and they were duly identified, and the debtors duly admitted the receipt of the consideration. Now, when the case to annul this deed was heard, it was heard in the first instance by one District Judge, who was succeeded afterwards in the course of the hearing by Mr. Baguley, who eventually decided the case. Their Lordships think there can be no doubt that on that hearing and, indeed, in their opinion throughout the hearing all the parties were of opinion that the onus was on the transferee, the mortgagee, to show that the transaction was one within the words of the Act, "in good faith and for valuable consideration," and as a result the agent of the mortgagee firm first called his witnesses, and he gave evidence himself. He called the attesting witnesses, and he produced his books, and he said that the debtors had had transactions with him for some time, that they had been indebted inasmuch as Rs. 25,000 borrowed at different times, and the money was still outstanding earlier in the year, but that they had gradually paid off the whole sum that had been lent by him, and that they desired to borrow Rs. 30,000 on mortgage, that he had assented, and that he had collected from different sources sufficient money to pay the Rs. 30,000, and, on the 7th July the matter was carried out and the deed had been written by a writer. There was some discrepancy as to who had given the orders for writing this deed, but it had been duly executed by the debtors and it had been attested by witnesses then and there. The debtors then were paid the consideration money, which had taken some time to collect, and the deed was afterwards taken to be registered, and it was registered, and, in the meantime, it was taken to the office of a person who was particularly chosen as being a respectable witness, he being the bailiff of the local District Court, and he witnessed it and the parties then proceeded to registration. Then he produced his books, and his books showed that the transactions had taken place in the early part of the year, as he enumerated them. The books showed the entry of this sum, and the creation of this mortgage deed, and the books also showed the gradual accumulation of the money which was required for the purpose of paying the Rs. 30,000, and they also showed that the daily cash balance of the mortgagee on this particular day was, at the end of the day, depleted by practically precisely the amount he said he had advanced to the debtor. His case was that, in addition to lending that money, when the parties returned from the registration officer they asked him for a further Rs. 10,000, which he gave them on a mere promissory note without any security,

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and this transaction was also entered in the books. The witnesses were cross-examined, and there is no doubt that they gave conflicting statements as to who precisely was present at any given time, where each of the transactions took place. In particular, the witness, who was the bailiff and was named Ba On, gave evidence to the effect that, though he had attested the document it was then only brought to him by the representative of the respondent, and he asked him to attest it, and he duly did attest it without the presence of the two debtors and without having their signatures acknowledged. So the trustworthy witness turned out to be less worthy of trust than he had originally been reputed to be.

Now the Receiver met this case by calling one witness only. He called the writer of the deed, and the writer of the deed contradicted two or three of the respondents' witnesses, because he said that he had written the deed in his own office or house, that he had been sent for by Chettyar on the morning when it was eventually executed, and that he himself never had been to the office or seen it executed or seen any of the attesting witnesses, though some of the witnesses said he was there.

The learned Judge, in consideration of all these circumstances, came to the conclusion that the circumstances were suspicious, and he attached importance to the fact that there was this large sum borrowed at one time, and that it was necessary to accumulate gradually sums sufficient to pay it, and he, not unnaturally, thought it was somewhat remarkable that, after the money had been borrowed and security provided, there was an unsecured loan of Rs. 10,000, and he attached considerable importance to the contradictions of the various witnesses of the facts stated in the agreements themselves, and he came to the conclusion that the defendants had not made out the case which they ought to have made out, and had not established that this was a *bona fide* transaction and one for value.

Now there are, no doubt, some remarkable circumstances in this case, and the witnesses also contradict one another to some extent; but it does not appear to their Lordships that, even assuming the onus to be where the learned District Judge places it, he was right in coming to the conclusion that the respondents did not discharge the onus that was upon them. The facts appear to be overwhelming that here there was a real transaction. The Chetty, the man that is who was in charge of the transaction, was the manager of the business, and could not

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be suggested to be the principal. He had duly recorded in the books, which were not challenged, a number of transactions, all of which bore out his story. He entered up the facts of the case, and he had shown in the books that he had advanced the money and he also showed in the books that he had borrowed money, obviously for the express purpose of being able to lend it to the debtors, and there was no affirmative evidence to the contrary, though no doubt some inference could be drawn from the fact that the witnesses had to some extent contradicted themselves. But the substance of the case is that no plausible method of carrying out the fraud, no plausible motive for such a fraud, was ever really put before the District Judge at all, and, indeed, it has not been put before their Lordships, and at the present moment it is not explained how it could be that these debtors, if they were minded to enter into a transaction which was not a *bona fide* one, should approach the manager of the branch business and induce him to enter into a series of forged entries in his books, because for every one of them he would eventually have to account to his principal.

That appears to their Lordships to be the substance of the case, and so regarding it their Lordships have no doubt that this transaction was a transaction which was proved to represent that which it purported to be—that is, the transaction of a real mortgage.

The case came before the High Court, and they took the view that their Lordships have expressed. Their Lordships cannot help feeling that perhaps in the High Court they expressed themselves rather too lightly in respect of the difficulties which the District Judge obviously had to deal with on the facts; in the result, however, their Lordships are of opinion that Mr. Justice Heald, who gave the judgment of the Court, took the right view of the transaction, and that it ought to have been treated by the trial Judge as a genuine transaction for value.

So far the case has been dealt with on the footing that the onus was in fact on the respondents, but since the case was on before the High Court in Rangoon the matter of onus has been decided in a case in which the judgment was delivered by this Board on the 29th July of this year, the case of an appeal from the Supreme Court of the Straits Settlements entitled *The Official Assignee of the Estate of Cheah Soo Tuan* against *Khoo Saw Cheow*.[1] That case arose on S. 50 of Ordinance No. 44

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1. P.C. Appeal No. 136 of 1929, since reported in 60 M.L.J. 210.—*K.J.R.*

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as to bankruptcy, which appears to be in the same terms in substance as section 53 of the Provincial Insolvency Act. The material words as cited in the judgment are: "Any settlement of property not being . . . a settlement made in favour of a purchaser . . . in good faith and for valuable consideration . . . shall, if the settlor becomes bankrupt within two years after the date of this settlement, be absolutely void as against the official assignee." The decision of the Board in that case was that the trial Judge had come to the wrong construction of section 50 by throwing the onus on the transferee. Only one passage from the judgment of the Board need be read:

"Their Lordships are of opinion (1) that the trial Judge was wrong in his construction of section 50 of the Ordinance; (2) that there was nothing in the admitted facts to shift the onus of proof to the respondent."*

Their Lordships, therefore, feel bound to state that the view taken in the District Court in this case as to the burden of proof was wrong. The onus was wrongly laid on the respondents; it was on the Official Receiver. It therefore follows that the decision given by the High Court was *a fortiori* correct, because it seems obvious that, if the onus was on the Official Receiver, he had not discharged the burden that was upon him.[1]

At an earlier stage the petitioning creditor had petitioned the Court disputing the proof of the respondents on the ground that the mortgage and promissory notes were fraudulent and without consideration. It is clear that this petition was never the subject of any separate determination by the Court. It is obviously disposed of by the findings on the Official Receiver's petition.

Now the only other point that arises is a point that was raised on the Registration Act. Their Lordships have already called attention to the fact that the endorsement by the Sub-Registrar upon the document recites that the document was presented for registration at 11 o'clock in the forenoon on the 7th day of July. Section 32 of the Registration Act provides that

"Every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office—(*a*) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

*Meaning thereby the transferee.—*K J R*

[1]*Reporter's Note*—On the question of *onus probandi* under S. 53 of the Provincial Insolvency Act, 1920, the decisions to the contrary, of the High Courts in India, (*see* Rustomji's "Insolvency and Bankruptcy," 2nd Ed., page 308, and Mulla's "Insolvency," pp. 429, 434), must now be regarded as overruled.—*K J R*

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or (*b*) by the representative or assign of such person, or (*c*) by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

It has been decided by this Board in *Jambu Parshad* v. *Muhammad Aftab Ali Khan*,[1] on appeal from the High Court at Allahabad that, where a document is presented for registration by an agent not authorised by a power-of-attorney, the registering officer has no jurisdiction to register it or to endorse thereon a certificate under S. 60, and the point is made that the endorsement shows that when the debtor presented this document for registration, he purported to act as agent for the mortgagee firm, but, inasmuch as he did not prove that he had a power-of-attorney authorising him to act for the mortgagees, the registration is bad under the decision above cited. Now it may be that one answer might be that there is no evidence in this case to show that the agent had no power-of-attorney, but, on the question of the person on whom the onus is in such a matter as that, their Lordships do not express any final opinion, except to say that, if the onus were on the Official Receiver in that matter, obviously he has not discharged it; but in this particular case there seems to be a simple answer, and that is this: the Sub-Registrar was called as a witness, and in cross-examination he said the document was presented to him by the debtor, and he said he wanted it registered. Now if that is so it would appear this document was duly presented for registration in accordance with section 32 of the Registration Act by some person executing the same, and that the registration is entirely in order, and that the learned District Judge who decided this part of the case was quite right in the view he took. Even if the endorsement purported to show an invalid presentation there is nothing in the Act to prevent a person from showing that the endorsement made by the Sub-Registrar was inaccurate, and proving the real facts.

It follows, therefore, with regard to this difficulty the point turns out to be a bad one, and there is no objection to be made on that footing.

Therefore, in their Lordships' judgment the appeal fails, and their Lordships will humbly so advise His Majesty. The appellant must pay the costs of this appeal.

Solicitors for appellant: *Cutler, Allingham and Ford.*

Solicitors for respondents: *Bramall and Bramall.*

K.J.R. *Appeal dismissed.*

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1. (1914) L.R. 42 I.A 22: I.L R. 37 A 49· 28 M.L.J. 577 (P.C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Mahomed Kanni Rowther .. *Petitioner** (*2nd Respondent*)

v.

Naina Mahomed Rowther and another .. *Respondents* (*Petitioners*).

Mahomed Kanni Rowther *v.* Naina Mahomed Rowther.

Civil Procedure Code (*V of* 1908), *O* 1, *Rr.* 8, 10, *O.* 22—*Limitation Act* (*IX of* 1908), *Art* 181—*Representative suit—Death of sole plaintiff—Suit if abates—Right of other members of community to continue suit—Period within which to apply—Dismissal before such application, whether nullity*

A representative suit was instituted by a person on behalf of a community with the sanction of the Court under O 1, R. 8 of Civil Procedure Code and he died during its pendency The Court having waited for over six months after the death of the plaintiff, dismissed the suit on the ground that it could not wait further; but subsequent to the dismissal, on the application by two other members of the community, added them as parties and directed the suit to continue.

Held, (1) that it would be *ultra vires,* if the Court had held that a representative suit would abate by reason of the death of the plaintiff, and

(2) that the order in question was right, as in the present case after the death of the plaintiff any other member of the community could apply to be added as plaintiff within three years under Art. 181 of the Limitation Act.

Opinion of Sadasiva Aiyar, J, in *Krishnaswami Aiyar* v. *Seethalakshmi Ammal,* (1918) 9 L.W. 166, followed.

The order of the Lower Court dismissing the suit must be deemed to be one passed without jurisdiction and there is no need to set it aside.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Madura Town, dated 5th September, 1929 and made in I.A. No. 50 of 1929 in O.S. No. 3 of 1928.

Watrap S. Subramania Aiyar and *T. P. Gopalakrishnan* for petitioner, referred to *Mohini Mohun Das* v. *Bungsi Buddan Saha Das,* (1889) I.L.R. 17 C. 580 at 583 (P.C.) and *Parameswaran Munpee* v. *Narayanan Nambodri,* (1916) I.L.R. 40 M. 110: 31 M.L.J. 279, in addition to the cases referred to in the judgment.

A. V. Narayanaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT.—This is a revision petition filed by the defendant against the order of the District Munsif of Madura Town, directing the addition of the respondents 1 and 2 as plaintiffs, and permitting them to continue the suit.

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*C.R.P. No. 1633 of 1929. 17th February, 1931.

Mahomed Kanni Rowther v. Naina Mahomed Rowther.

The suit was instituted by one Musafar Rowther, on behalf of himself and other members of the community of *Melagar Uraimuraigars* of Ghoripalayam, and the necessary permission of the Court under O. 1, R. 8, Civil Procedure Code, was also obtained. The suit is therefore a representative suit. The proper cause title for such a suit is:

"Musafar Rowther, on behalf of himself and all the other members of the community .. *Plaintiff*

v.

Muhammad Kanni Rowther .. *Defendant.*"

The aforesaid Musafar Rowther died at the end of May, 1928. His son intervened with two applications, to be added as a plaintiff, but both of them were dismissed, the first, on the ground, that in a representative suit of this kind, the son of the deceased who filed such a suit could not claim that the right to sue survived to him, and the second, on the ground, that he was not a member of the community on whose behalf the suit was filed. On the very day on which the Court dismissed his second petition, the District Munsif dismissed the suit itself, stating that he would not wait for another application by some other person, and that there was no plaintiff on record. This dismissal was on 20th November, 1928. The present application was filed by the respondents on 3rd January, 1929, under O. 1, Rr. 8 and 10 and S. 151 of the Code. This was granted by the Lower Court, and the propriety of that order is now questioned in this revision petition.

It is rightly conceded, that in view of the suit being a representative suit, there could be no abatement under O. 22, Civil Procedure Code, by reason of the death of Musafar Rowther. If the Court had held that the suit abated, that order would be *ultra vires*. On the death of Musafar Rowther who filed the suit on behalf of himself and others having the same interest, as members of the community, any person on whose behalf also that suit was filed, can apply to the Court to be added as a plaintiff for continuing the suit. There is no article in the Limitation Act specifically providing the period of time within which that application should be put in. The opinion expressed by Mr. Justice Abdur Rahim in the case reported in *Sivagurunatha Chettiar* v. *Ramaswamy Aiyangar*[1] seems to be, that there is no limit of time for an application under O. 1, R. 8, Civil Procedure Code, to be made a party to the suit. But in the decision of a Division Bench reported in *Krishnaswami Aiyar*

1. (1911) 11 M.L.T. 257.

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v. *Seethalakshmi Ammal*[2] Sadasiva Aiyar, J., is of opinion that the residuary Art. 181 of the Limitation Act fixing a period of 3 years would apply to such an application. It is clear that even in a representative suit under O 1, R. 8, Civil Procedure Code, any person seeking to be added as a party, on the ground that the person who filed the suit is dead, or has rendered himself unfit to be entrusted with the conduct of the suit, must make an application to the Court for that purpose. If he is so brought on record, he will be *eo nomine* the plaintiff, who can continue and conduct the suit. This being an application for which no special period is provided for, Art. 181 should reasonably apply to it, and I prefer to follow the opinion of Sadasiva Aiyar, J. It is an elementary principle, that a suit should not be dismissed on the death of a sole plaintiff, till the expiration of the period fixed for his legal representative to come in. (Vide also *Kissen Gopal Karnani* v. *Suklal Karnani*[3] for the application of this principle in a case where the plaintiff was adjudged an insolvent). In the present case, after the death of Musafar Rowther, any other member of the community could apply to be added as plaintiff within three years under Art. 181.

Before the expiration of that period, it seems to me, the Court had no jurisdiction to dismiss the suit for default. Though the suit is a representative suit for the purpose of making the whole community bound by the decision given in the suit, it cannot be said that the other members of that community were *eo nomine* plaintiffs on record, so that the Court could dismiss the suit on 20th November, 1928, for default, on account of the non-appearance of any of them. It has been held in *Udmi* v. *Hira*[4] that the suit or appeal would not abate if one of such persons should die, and there is no need to bring in his legal representative. The order of the Lower Court, dismissing the suit on 20th November, 1928, must be deemed to be one passed without jurisdiction, and there is no need to set it aside. If it is an order of dismissal for default under O. 9, Civil Procedure Code, which is not a nullity, it has got to be set aside within 30 days. Otherwise, it is no bar to the present application which has been filed within three years of the death of Musafar Rowther.

The order in question is right, and this Civil Revision Petition is dismissed with costs.

K.C. *Petition dismissed.*

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2 (1918) 9 L.W. 166.
3. (1926) I.L.R. 53 C. 844. 4. (1920) I.L.R. 1 Lah. 582.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Sri Sri Sri Gajapathi Krishna Chandra Deo Garu, Zamindar of Nandigam Estate .. *Appellant** *(2nd Defendant)*

v.

His Highness Sri Mirja Rajah Sri Pushpati Alakh Narayana Gajapathi Raju Maharaja Manya Sultan Bahadur Varu, Rajah of Vizianagram .. *Respondent (Plff.).*

Gajapathi Krishna Chandra Deo *v.* Rajah of Vizianagram.

Easement—Agricultural tank—Right to flood adjacent land—Whether amounts to apparent and continuous easement—Partition of estate—Tank kept in common—Reservation of easement—Storage of water in tank—Inundation of adjacent land when actionable for damages—Easements Act, 1882, *S* 13, *cls* (*c*), (*d*) *and* (*f*).

The proprietor of an estate constructed an irrigation tank in about 1813. The estate was partitioned into two estates in 1864 but the tank bund and a considerable part of the bed of the tank were kept common to the two estates It appeared that from the date of its construction till about 1878 the tank was inundating the adjacent lands. In 1878 a very serious breach was made in the tank bund as a result of a flood and that breach was not effectively repaired till 1913. During the intervening period there was very little water in the tank, but the proprietors had never abandoned their rights therein In 1899 the Court of Wards, who had taken over the management of one of the estates, conveyed certain villages including a portion of the tank bund to the plaintiff In 1913, as a result of the bund having been repaired and restored to the original level which prevailed in 1878, the plaintiff's lands were submerged. The plaintiff filed a suit against both the estate-holders for an injunction restraining the defendants from improving the tank or constructing new weirs and to direct them to remove the newly constructed bund and weir, or in the alternative for damages.

Held, that as a result of the partition an apparent and continuous easement to submerge the adjacent lands was reserved in favour of the estate holders, that the easement was not affected by reason of the sale to the plaintiff of a part of one of the estates by the Court of Wards and consequently the repair of the tank-bund so as to restore it to its original level was not actionable.

Per Kumaraswami Sastri, J.—The rule in *Rylands* v. *Fletcher,* (1868) L.R. 3 H.L. 330, that a person who stores water on his land is *prima facie* answerable for the damage consequential on its escape is inapplicable to irrigation tanks in India which have been in existence for several years The storing of water in an agricultural tank is a natural and lawful user and is not actionable for damages unless negligence is proved.

Madras Railway Co v. *Zamindar of Carvatenagarum,* (1874) L.R. 1 I.A. 364, relied on.

Per Reilly, J.—The right to submerge adjacent lands cannot be claimed by the alienating proprietor as an easement falling under cls. (*c*) and (*d*) of S. 13 of the Easements Act.

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*Appeal No. 16 of 1928. 25th February, 1930.

Gajapathi Krishna Chandra Deo v. Rajah of Vizianagaram.

Appeal against the decree of the Court of the Subordinate Judge of Berhampore in O.S. No. 21 of 1923.

B. Jagannadha Das and *V. V. Jogayya* for appellant.

S. Venkatesa Aiyangar for respondent.

The Court delivered the following

Kumaraswami Sastri J.

JUDGMENTS. *Kumaraswami Sastri, J.*—Second defendant is the appellant. This appeal arises out of a suit filed by the plaintiff who is the Rajah of Vizianagram against the 1st defendant who is the Zamindar of Pata Tekkali and the 2nd defendant who is the Zamindar of Nandigam for an injunction restraining the defendants or either of them from restoring and improving the irrigation tank called the Padmanabha Sagaram or to construct new weirs at any portion of it so as to affect the rights of the plaintiff in the lands situate in Mallividu and Kallada villages, to direct them to remove the newly placed bund of Padmanabha Sagaram tank at the places where it was breached in 1878 and to remove the newly constructed surplus weir, or in the alternative for damages, which the plaintiff estimates at Rs. 1,000 per annum.

The facts leading to this appeal are as follows:—The estates of Tekkali and Nandigam formerly formed one estate known as the Tekkali Estate. The Padmanabha Sagaram tank was constructed about the year 1813 or so by a former proprietor of the estate in order to irrigate certain villages. The estate was partitioned in 1864 and became two estates, one known as Pata Tekkali which is now owned by the 1st defendant and the other known as Nandigam which now belongs to the 2nd defendant. In the year 1878 owing to abnormal rains the bund breached considerably and it was not capable of storing as much water as it used to do. The proprietor of the Nandigam Estate at that time got into debt and financial difficulties and the estate was subsequently taken over by the Court of Wards and managed. After the estate was restored to the heirs of that Zamindar the tank repairs began in 1910 and were completed in about 1913. In 1920 the plaintiff complained that the effect of the repairs was to flood a portion of his lands in the village of Mallividu and this suit was filed in 1923 for the reliefs above stated.

When the Nandigam Estate was managed by the Court of Wards, they resolved to sell some villages in the estate in order to discharge the debts incurred by the Zamindar and put up for sale five villages. These villages were purchased in auction by the Rajah of Vizianagram on the 12th of June, 1899.. Two

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of the villages with which we are concerned were Kallada and Mallividu.

The plaintiff's case is that by reason of the repairs and the erection of the surplus weir 74 acres 49 cents of his lands in Mallividu and 7 acres 30 cents of his lands in Kallada have been submerged and rendered unfit for cultivation. He states in his plaint that the Padmanabha Sagaram tank which bounds the village of Mallividu was a tank constructed in the beginning of the 19th Century to irrigate the lands of the 1st and 2nd defendants when the two estates were joint, that the estate became severed in 1864, that in 1878 the Padmanabha Sagaram tank was breached and was since abandoned as a tank by defendants 1 and 2 and remained in the same condition till 1913, that in 1912 there was a dispute between the plaintiff and the 2nd defendant regarding the eastern boundaries of Mallividu village and the Survey authorities fixed it by placing stones along the boundary as given to the plaintiff's predecessor-in-title by the sale to him in 1899, that when the villages were purchased by the plaintiff's predecessor-in-title the tank bed of the Padmanabha Sagaram was restricted and that defendants 1 and 2, having abandoned the tank in 1878 and allowed it to continue in that state till 1913, when they not only restored the tank to its condition previous to 1878 but considerably raised the bund and constructed a surplus weir, lost all their rights to restore the tank to its original condition, thereby affecting the rights of the plaintiff as they existed in 1899, the year of the purchase.

The 1st defendant filed a written statement stating that the Padmanabha Sagaram tank is the joint property of himself and the 2nd defendant, that the 1st defendant has his own right to take water from the Sagaram in certain proportions in certain places jointly with the 2nd defendant, and to his exclusion in other places and that it is not true that the tank breached in 1878 or was abandoned from that time or continued in a ruined state till 1913. He says that as a matter of fact the tank was being repaired in the interval every now and then as occasion arose, that he has not lost his right to restore the tank to its original condition, that he was no party to the sale by the Court of Wards or to the proceedings before the Survey Officer and that he is not bound by them. He admits that the tank was repaired in 1913, but denies that the bund was raised to a height more than what it was previously and that the plaintiff has suffered any damages, and states that even if the plaintiff has suffered any damage he, the 1st defendant, is not liable for the same. He says that the lands referred to in the plaint have

always been under submersion, that even more lands were being submerged, that owing to the collusion of the 2nd defendant with the plaintiff the 2nd defendant built a weir to the north of the tank bund and fewer lands than usual are now being submerged, that the new weir forms the subject-matter of dispute between him and the 2nd defendant, that the lands referred to in the plaint form part of the tank bed and that the plaintiff has no right to cultivate the same. He denies that the plaintiff has uninterrupted and open enjoyment as of right of the lands under the tank. He states that his rights are not barred by limitation.

The 2nd defendant filed a written statement admitting the breach of the tank in 1878 but denying that the tank was abandoned by the defendants and alleging that it was being repaired from time to time. He states that the defendants never lost the right to repair the tank. He denies that the bed of the tank was restricted by the Survey Officers as alleged by the plaintiff and states that any act of the Survey Officers would not bind him. He states that he is not aware of any arrangement between the Court of Wards and the Rajah of Vizianagram and in any event it will not bind him, that it is not true that the tank bund has been raised or in any way altered beyond what it was before the breach, that the plaintiff has sustained no damage and even if he did the 2nd defendant is not responsible as he only restored the tank to its original condition, that the lands referred to by the plaintiff were, as a matter of fact, subject to submersion from time immemorial and formed part of the bed of the Padmanabha Sagaram tank, that the plaintiff cannot now question the right of the defendants as those lands were always subject to submersion except when the tank was not full of water, that the defendant's right to repair the tank is not barred by limitation, that though one of the surplus weirs was newly constructed, there was formerly a weir by the side of the newly constructed weir and that the new construction does not cause any damage to the plaintiff.

The Subordinate Judge held that the defendants never abandoned the Padmanabha Sagaram tank but that temporary repairs were being executed, that both the defendants were jointly entitled to the tank and the water stored therein and that they have not lost their right to repair the tank. As regards the repairs which were actually effected, the case of the plaintiff that the bund was raised to a higher level than it was before was abandoned. As a matter of fact, it was found that the bund was not raised but that it was lower than the original level. He

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also found on the evidence that 76 acres 83 cents in Mallividu village were liable to submersion and were being actually submerged till 1878 before the tank was breached but after the breach the waterspread became restricted, that they were not under submersion for some time prior to 1899 and that after the purchase by the Vizianagram Estate in 1899 the area submerged varied, the variation depending on the rainfall. He finds that no lands were submerged in Kallada village. So far as the 1st defendant was concerned, he was of opinion that the 1st defendant was not a party to the sale or the survey proceedings between the plaintiff and the 2nd defendant and that the plaintiff is not entitled to any relief against the 1st defendant. As regards the issues as to the right of the plaintiff to the Padmanabha Sagaram tank and whether the plaintiff is entitled to have the bund of the tank lowered and the subsequent weir removed he states that they were not pressed. He was however of opinion that the 2nd defendant had no right to submerge the lands which were sold by the Court of Wards and that the plaintiff was entitled to question the submersion as no right to inundate was reserved by the Court of Wards at the date of the sale. In the result he gave a decree for the plaintiff for Rs. 600 damages for the years 1921, 1922 and 1923. He gave an injunction against the 2nd defendant restraining him from increasing the height of the bund of the tank or of the surplus weirs or of both and refused the other reliefs claimed by the plaintiff.

No appeal or memorandum of objections was filed by the plaintiff as regards that portion of the decree which dismissed the suit against the 1st defendant so that that portion of the decree has become conclusive and final. The result of it is that on the findings of the Subordinate Judge, that the tank was the common property of the 1st and 2nd defendants, that the 1st defendant is not bound by anything which the Court of Wards did and has a subsisting right to repair the tank and restore it to the condition in which it was before the breach in 1878, the plaintiff could have no right to complain if the 1st defendant chose to-morrow to repair the tank by raising the bund to its original level and submerge all the lands which the plaintiff now complains are being submerged and rendered unfit for cultivation.

So far as the 2nd defendant (one of the joint owners) however is concerned a decree has been passed making him liable for damages for the restoration of the bund. [His Lordship discussed the evidence and concluded:]

I agree with the Subordinate Judge that there was no abandonment of the tank at any time either by the Tekkali or Nandigam proprietors. The bund was breached and though effective repairs were made only in 1912 and 1913, there was correspondence as to repairs which we have already referred to and the ryots were taking water from the tank though there was a very small quantity of water.

As regards the purchase by the plaintiff of the five villages referred to in the plaint including Mallividu and Kallada these villages originally belonged to the Nandigam Estate. The predecessor-in-title of the 2nd defendant had heavily encumbered the property. In order to discharge the debt the Court of Wards resolved to sell six villages by public auction.

[His Lordship referred to the sale by the Court of Wards in favour of the plaintiff, and the later survey proceedings wherein the disputes as to boundaries were decided and after discussing the report of the Commissioner as regards the effect of the restoration of the tank bund proceeded:]

On the findings of the Subordinate Judge which we accept, namely, that the Padmanabha Sagaram tank was common to both the defendants, that the tank was never abandoned, that prior to the breach in 1878 the lands now complained of were being submerged, that the sale by the Court of Wards included a portion of the tank bed and that the claim to restore the tank is not barred by limitation, the question is whether the plaintiff, who purchased a portion of the tank bed, is entitled to complain if the owners of the tank repaired the bund in such a manner as not to submerge any more lands than were submerged before the breach.

The ground on which the Subordinate Judge puts the liability on the 2nd defendant is that the Court of Wards having sold the property and the 2nd defendant being bound by the sale the plaintiff is entitled to question the submersion as no right to inundate was reserved by the Court of Wards who acted as guardian of the 2nd defendant. We do not think it necessary that any rights should be reserved.

It is clear that when the Tekkali Estate was partitioned into two estates—Pata Tekkali and Nandigam—and this tank was kept as a common tank irrigating the villages belonging to both the proprietors, Nandigam Estate could not have objected if Pata Tekkali had repaired the breach on the ground that some of his lands were being submerged.

The sale by the Court of Wards representing the Nandigam Estate to the Rajah of Vizianagram of the five villages could

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not possibly affect the rights of Pata Tekkali. The only question is whether as between Nandigam and the purchaser, the Rajah of Vizianagram, Nandigam lost his right to repair the breach and restore the tank to its original condition.

So far as the Indian Law is concerned, no reservation is necessary where there is a conveyance or partition of property. The Easements Act follows the law as laid down in *Pyer* v. *Carter*,[1] which was referred to with approval by Mellish, L.J., in *Watts* v. *Kelson*[2] and does not adopt the law as laid down in *Wheldon* v. *Burrows*,[3] that in the case of a grantor express reservation was necessary with certain exceptions as in the case of ways of necessity while in the case of a grantee of part of a tenement all those continuous and apparent easements over the other part of the tenement which are necessary for the enjoyment of the part granted and have been hitherto used therewith would pass as a general rule.

The mere fact that the Court of Wards sold a part of the Nandigam Estate which included this tank bed would not of itself take away the right of the Zamindar who was the owner of the rest of the property to repair the tank unless there was any negligence in the repairs—and it is not suggested here that there was any negligence—or unless he raised the bund higher than it was when the tank was breached. The mere fact that he stored water in this tank after repairing the bund and that the water inundated the plaintiff's land which was in the tank bed would not give the plaintiff a right to sue for damages.

Reference has been made by the respondent to the English Law on the subject of storing water as laid down in *Rylands* v. *Fletcher*[4] and the other cases and to the observations of Blackburn, J., where the learned Judge lays down the rule governing those cases as follows:—

"We think that the true rule of law is, that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape."

Reference is also made to the cases where a person by artificially raising the surface of his own land causes water, even though arising from natural rainfall, to pass to his neighbour's land, and interferes with his enjoyment.

1. (1857) 1 H. & N 916: 156 E.R. 1472
2. (1871) L.R. 6 Ch A 166
3. (1879) 12 Ch.D. 31.
4. (1868) L.R. 3 H.L. 330.

I think these principles are inapplicable to irrigation tanks in India which have been in existence for several years. The Fifth Report shows that when Permanent Settlements were made instructions were given by the East India Company as to tanks in existence and also new tanks that may be constructed (page 184, para. 59) and there is no reason to draw any distinction between tanks in existence at the time of the Permanent Settlement and that constructed afterwards. Their Lordships of the Privy Council in the case I shall refer to presently speak of the duty "of maintaining existing tanks and of constructing new ones." The Madras Estates Land Act also casts on the landlord the duty of repairing tanks in existence without any reference as to when they were constructed.

The law on the subject has been clearly settled by the decision of their Lordships of the Privy Council in *Madras Railway Company* v. *Zamindar of Carvatenagrum,*[5] where it has been held that the storing of water for agricultural purposes is a natural and lawful user and is not actionable for damages done unless there was negligence proved. In dealing with this point their Lordships of the Privy Council observed:

"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Mahomedan Law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on Zamindars, of whom the defendant is one. The Zamindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian Law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in *Fletcher* v *Rylands.*[6]

In that case the defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns 'a non-natural use' of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the Railway Company to maintain their railway."

Under the Madras Estates Land Act the tenants can compel a landlord to repair a tank which is the source of irrigation by a proper application to the Collector.

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5. (1874) L.R. 1 I.A. 364. 6 (1868) L.R. 3 H.L. 330.

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There can be little doubt that this tank which was built about 1813 was inundating the lands now in question till the breach in 1878. The plaintiff purchased a portion of the bed of that tank. When he purchased that portion, owing to the tank not having been repaired, the bed was over-grown with trees and shrubs. From the very nature of things he must have known that if the bund was repaired, the land would be flooded. No representation was made to him that the owners would not repair the bund. It is no doubt true that from 1878 to 1900 the tank was in a state of disrepair but the right to repair was never abandoned. Attempts were being made to restore the tank by the owner of Pata Tekkali and the only thing that stood in the way was that the Court of Wards, owing to the Zamindar of Nandigam Estate having mortgaged the lands and encumbered the estate, did not think it prudent to embark upon an expense about the repair as any benefit that would arise would be enjoyed by the mortgagees. It cannot be said that there was anything in the case which would have reasonably led the Vizianagram Zamindar (the purchaser) to infer that there was any abandonment by the Nandigam Estate. It seems to me to be clear that where a person buys property which is a portion of a tank bed he must know that the bed is liable to submersion if the owner of the tank should repair it. And having regard to the sale proclamation and to the price which was paid for this village I have little doubt that there would have been no representation that the tank would not be repaired and that these lands could be converted by the purchaser into cultivable wet lands.

The mere fact that the bund was not repaired from 1878 to 1910 would not amount to an abandonment of any easements or rights as mere non-user is not sufficient.

Chapter V of the Easements Act deals with the extinction, suspension and revival of easements. Section 38 says that extinction may be by a release by the dominant owner, expressly or impliedly, in favour of the servient owner, and Explanation II to the section distinctly says that mere non-user of an easement is not an implied release within the meaning of the section.

Section 47 states that a continuous easement is extinguished when it ceases to be totally enjoyed as such for an unbroken period of twenty years and that a discontinuous easement is extinguished when for a like period it has not been enjoyed as such. Such period shall be reckoned in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant

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owner, and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.

Treating the case as one of easement, the right to flood the lands by storing water in an irrigation tank is a continuous easement as after the tank is constructed no further act is necessary. Rain when it falls fills the tank and the tank overflows. It is analogous to the case of a man building a house and putting up a window. It is also an apparent easement.

I am of opinion that the decision of the Subordinate Judge awarding damages or granting an injunction against the 2nd defendant cannot be supported.

It is unnecessary, in the view I take of the case, to consider the further question as to whether on the allegations in the plaint that both the defendants repaired the tank and the decision of the Judge that the 1st defendant is not liable for damages and that the sale by the Court of Wards is not binding on him, no damages can be awarded against the 2nd defendant or the further argument that the Court of Wards when they sold the property could not have entered into any covenant the effect of which would be to throw a personal liability on the Zamindar and prevent him from using the tank as an irrigation tank.

I would reverse the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs of the 2nd defendant throughout. The memorandum of objections is also dismissed with costs.

It is unnecessary in this case to decide anything as to the rights of the parties should the bund be further raised.

Reilly, J.

Reilly, J.—It is admitted that the Padmanabha Sagaram was constructed not later than 1833, at a time when the present Pata Tekkali and Nandigam Estates were parts of one Estate, the original Tekkali Estate, and that, as the bund was then constructed, the water in the tank when full covered considerable areas in several villages, including Mallividu and Kallada, with which we are concerned in this case. It is also admitted that a very serious breach was made in the tank bund by a flood in 1878 and that breach was never completely and thoroughly repaired until 1913. The allegation that in the repairs of 1913 the original height of the weir was raised has been given up. Indeed the Commissioner's report and plan disprove it. It is clear therefore that no more land has been submerged in consequence of the repairs of 1913 than was submerged by the tank as originally constructed. The plaintiff's land in Mallividu and

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Kallada, so far as it has been submerged in consequence of the repairs of 1913, is within the original tank-bed. The plaintiff in 1899 bought the Mallividu and Kallada villages from the Nandigam Estate, and included in his purchase was part of the tank-bed, though that part was not being submerged at that time in consequence of the breach of the tank-bund.

Mr. Jagannadha Das for defendant 2, the Zamindar of Nandigam, in one part of his argument tried to persuade us that, when Nandigam sold the two villages to the plaintiff, an easement to submerge the parts of them within the tank-bed was implicitly reserved to Nandigam by clauses (*c*) and (*d*) of section 13 of the Easements Act. I have no doubt that neither of those clauses can apply to that sale. The right of submersion could not be an easement of necessity under clause (*c*) in such circumstances; and it may be remarked that for 35 years, from 1878 to 1913, the Zamindar of Nandigam enjoyed his estate without the benefit of it. Nor could the right come within clause (*d*) as necessary for the enjoyment of the Nandigam Estate as it was enjoyed at the time of the sale in 1899, when the bund had been breached for 21 years. These contentions are in no way essential for this appeal; but they appear to have been put forward because Nandigam is anxious for some reason to succeed in this appeal without, if possible, winning a victory for Pata Tekkali also.

Those two estates were formed by partition of the Tekkali Estate in 1864. That was more than 30 years after the tank was constructed. It is admitted that the water of the tank has been used for villages of both Estates since the partition and was intended under the partition so to be used. The learned Subordinate Judge in his judgment has made inconsistent statements about the ownership of the tank since the partition. In para. 25 he says that "there is absolutely no evidence to show that the Tekkali Estate has any right as owner or joint-owner to any portion of the Padmanabha Sagaram tank-bed." But in the previous paragraph he had recorded a finding that "the tank belongs to defendants 1 and 2" and has described them as the "owners thereof." No means of reconciling these statements has been suggested to us. But it is admitted that the bund of the tank and the part of the waterspread nearest to the bund—a very considerable area—were left common to the two estates at the partition. In the plaint it is alleged that the Zamindars of Pata Tekkali and Nandigam abandoned the tank in 1878 and that they restored the bund in 1913, and it is pleaded that the

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tank-bed was restricted at the time of the plaintiff's purchase in 1899. Defendant 1 in his written statement definitely asserted that the tank belonged to both defendants. Defendant 2 said nothing on this point in his written statement. On the pleadings it is clear that all parties proceeded on the basis that the tank-bund and the lower part of the tank-bed, whatever its present extent might be, were owned in common by the two defendants. There is no reason to suppose that that is not still the position. In the latter part of his argument Mr. Jagannadha Das said that he admitted this "for the purpose of this case." It is not necessary to consider now whether anything is gained for Nandigam by putting the admission in that guarded way, as at any rate it agrees with the pleadings of both the plaintiff and defendant 1 and leaves no dispute on the question in this case.

The position therefore is that at the partition of 1864 the tank-bund and a considerable part of the bed of the tank were kept common to the two Estates, and of the rest of the original Tekkali Estate, some villages were allotted to Pata Tekkali and others, including Mallividu and Kallada, which embraced part of the bed of the tank—the upper part which would not be submerged except when the tank was full or nearly full—were allotted to Nandigam. That being so, the important question appears to me to be whether at the partition of 1864 any right to submerge that upper part of the tank-bed in Mallividu and Kallada was reserved by way of easement in favour of Pata Tekkali and Nandigam, the tenants-in-common of the bund of the tank and the lower part of its bed. If such an easement was then reserved, it could not be affected by the sale of Mallividu and Kallada to the plaintiff by Nandigam and, unless it has been lost, it still subsists in favour of Pata Tekkali and Nandigam.

Such an easement would be a continuous one in the technical sense and also an apparent one, as its extent could be calculated easily from the height of the weir by a competent person. It would also have been necessary for the enjoyment of the tank-bund and the lower part of the tank-bed as they were enjoyed at the time of the partition. If the partition has been a simple one, by the terms of which Mallividu and Kallada fell to the Nandigam Estate and the tank-bund and the lower part of the tank-bed to Pata Tekkali, there is no doubt that such an easement would have been created by the partition in favour of Pata Tekkali. That is the principle of section 13 (*f*) of the Ease-

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ments Act; and, though that Act was not in force in 1864, the time of the partition, the Act made no change in the law in that respect—see *Pearson* v. *Spencer*,[7] *Allen* v. *Taylor*,[8] *Phillips* v. *Low*,[9] *Nicholas* v. *Nicholas*[10] and *Purshotam Sakharam* v. *Durgoji Tukaram*.[11] Authorities indeed are hardly required on that point, as in such a partition each party is in turn grantee, and the ordinary rule applies, that such an easement goes by implication with the grant. Here the position is not so simple, as, though Nandigam was grantee in the case of Mallividu, Kallada and other villages and Pata Tekkali was grantee in respect of another set of villages, both the grantors, Pata Tekkali and Nandigam, retained the tank-bund and the lower part of the tank-bed in common. So far as Mallividu and Kallada were concerned, Nandigam was grantee and Pata Tekkali was grantor; but both grantor and grantee retained the tank-bund and the lower part of the tank-bed. Did that transaction create an easement in favour of Nandigam and Pata Tekkali over the part of the tank-bed within the limits of Mallividu and Kallada? Unfortunately the partition deed has not been produced. But we know that for 14 years after the partition—until the breach was made in 1878—the part of the tank-bed within the limits of Mallividu and Kallada was submerged whenever the tank was full. We also know that the water of the tank was required, and is still required, for villages below the tank both in Nandigam and in Pata Tekkali. Nandigam is as much interested now, and was as much interested at the time of the partition, in the right to submerge parts of Mallividu and Kallada as Pata Tekkali. In the circumstances it appears from the very nature of the transaction, by which, while the rest of the original Tekkali Estate was divided, this tank-bund and the lower part of the tank-bed were reserved to be held in common, that the intention of the parties must have been to preserve in the interests of both the right to submerge the upper part of the tank-bed in Mallividu and Kallada whenever there was a full supply to the tank. This is not a case of setting up an implied reservation in favour of the grantors against the doctrine of *Wheldon* v. *Burrows*.[3] It is rather on examination something implied in favour of the grantees. Nandigam and Pata Tekkali granted to each other their rights in certain villages below the tank, which were then irrigated

3. (1879) 12 Ch.D. 31.
7. (1863) 3 B. & S. 761: 122 E.R. 285.
8. (1880) 16 Ch.D. 355.
9. (1892) 1 Ch. 47.
10. (1900) 81 L.T. 811.
11. (1890) I.L.R. 14 B. 452.

by the tank. That implied in favour of each grantee the right to water from the tank for irrigating the villages below the tank which fell to his share, and that right could not be enjoyed to the extent it was then enjoyed unless the grantors together retained the right to submerge the parts of Mallividu and Kallada which were within the tank-bed. By the very nature of the transaction therefore the grant of Pata Tekkali's interest in Mallividu and Kallada to Nandigam was subject to that easement being created in favour of both Nandigam and Pata Tekkali.

If that is the right view of the transaction—and so it appears to me—the rest of the case is simple. Nandigam could not affect that easement by the sale to the plaintiff in 1899. Nor is the continuance of the easement affected by the fact that it was not used from 1878 to 1913, while the tank-bund was breached. Under section 47 of the Easements Act non-user does not extinguish a continuous easement until it has lasted for 20 years from the day on which enjoyment was obstructed by the servient owner or made impossible by the dominant owner. It is not suggested that Nandigam or Tekkali ever did anything to make their enjoyment of the easement impossible or that the plaintiff ever obstructed their enjoyment. On the contrary the plaintiff did not even bring this suit until 10 years after the breach had been closed and use of the easement had begun again. I agree that the plaintiff can get no relief in this suit.

It was represented to us at one stage for the plaintiff that, if the submersion of land in Mallividu were allowed to continue, he would be very hardly used as he had bought that village at a high price believing the land submerged to be cultivable. We could not decide the case on any such consideration. But it is satisfactory to know that there is no basis for the plaintiff's supposed grievance. As he bought five villages, including Mallividu and Kallada, in auction for a lump sum we do not know what he paid for Mallividu. But the sale notification shows that of the whole village only a small fraction was represented to be cultivable land, and the explanation of that no doubt is that a large part of the village was, as any one could ascertain, liable to submersion if the tank-bund was repaired.

I agree that this appeal should be allowed and the suit dismissed with costs of defendant 2 in both Courts and that the Memorandum of Objections also should be dismissed with costs.

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Defendant 1 has not appealed against the order that he should bear his own costs in the Subordinate Judge's Court.

B.V.V. *Appeal allowed.*

Memorandum of Objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE SUNDARAM CHETTY.

Muthyala Narayanappa .. *Appellant** (*Plff.*)

v.

Muthyala Ramachandrappa .. *Respondent* (*Deft.*).

Narayanappa. v. Ramachandrappa.

Civil Procedure Code (*V of* 1908), *Sch II, Paras* 17, 18 *and* 19—*Arbitration out of Court—Agreement to refer—Death of one of the arbitrators—Suit—Application for stay—Powers of Court*

The parties had agreed to refer their disputes to arbitration and to abide by the unanimous award of three specified arbitrators. Pending arbitration proceedings, one of the arbitrators died The agreement contained no provision for filling up the vacancy. One of the parties thereupon filed a suit and the other applied under para. 18 (Sch II, Civil Procedure Code) for stay.

Held, the Court had no power to stay the proceedings as the agreement became inoperative on the death of one of the arbitrators. Any reference made by the Court to two of the arbitrators only or after substituting a new arbitrator in the place of the deceased would not be consistent with the agreement. That is "sufficient reason'' within the meaning of paras. 17 (4) and 18 of Sch. II. The provisions of paras 4 and 5 cannot be invoked; those provisions can be applied only if they are consistent with the agreement (*vide* para. 19).

Deutsche Springstoff Actien Gesellschaft v. *Briscoe,* (1887) L.R. 20 Q.B.D. 177, *Jaitum Bi* v. *Nabi Saheb,* (1912) 24 M L J. 15. *Ramayya* v *Bapayya,* (1926) 51 M.L.J. 440 and *Laxman* v *Manjunath,* (1921) I.L.R. 45 Bom. 1181, followed

Sadiq Husain v. *Nasir Begam,* (1911) L.R. 38 I.A 181 · I L.R. 33 A 743 · 21 M.L J. 1151 (P.C), *Pestonjee Nusserwanjee* v *Manockjee & Co*, (1868) 12 M I A 112 and *Perumalla Satyanarayana* v. *Perumalla Venkatarangayya,* (1903) I.L R. 27 Mad 112: 13 M.L.J. 311, distinguished

Bala Pattabhirama Chetti v *Seetharama Chetti,* (1894) I.L.R. 17 Mad 498, *Ma Bu U* v. *Maung Pe Lan,* (1917) 42 I.C. 911, *Brooke* v *Surdayal,* (1874) 12 Beng. L.R. App 13, *Sri Ram* v. *Sorabji,* (1919) 51 I.C. 636 and *Ahmad Nur Khan* v *Abdur Rahman Khan,* (1919) I.L R. 42 A. 191, referred to.

Bhagwan Das v *Gurdayal,* (1921) 19 A.L.J. 823 and *Fazal Ilahi* v *Prag Narain,* (1922) I.L.R. 44 All. 523, not followed

Appeal against the order of the Court of the Subordinate Judge of Bellary, dated 10th March, 1930 and made in O.S. No. 27 of 1929 (O.S. No. 36 of 1929 on the file of the District

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*A.A.O. No. 272 of 1930 and C.R.P. No. 1034 of 1930. 28th August, 1930.

Court, Bellary) and Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of Bellary in M.A. No. 19 of 1929 preferred against the order of the Court of the Subordinate Judge of Bellary, dated 13th August, 1929 and made in I.A. No. 96 of 1929 in O S No. 8 of 1929.

Narayanappa v. Ramachandrappa.

V. S. Narasimhachar for appellant.

B. Somayya and *Kasturi Seshagiri Rao* for respondent.

The Court delivered the following

Anantakrishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—The parties to these cases before us are brothers. By an agreement, dated 31st October, 1926, the parties agreed to have their disputes relating to partition settled by three specified arbitrators. During the course of the arbitration proceedings one of the arbitrators died. One of the brothers filed O.S. No. 8 of 1929 on 22nd March, 1929, against his brother. The 1st defendant in O.S. No. 8 of 1929 applied under para. 18 of the second Schedule of the Code of Civil Procedure to have the suit stayed. The Court held that the arbitration could go on with a fresh arbitrator that may be appointed by the Court. The plaintiff in O.S. No. 8 of 1929 preferred an appeal against that order, and the learned District Judge set aside that order, holding that the arbitration agreed to between the parties could not go on, as one of the arbitrators was dead, and as there was no provision in the agreement regarding the appointment of a substitute in the place of the arbitrator who is dead. Against the decision of the learned District Judge directing the suit to proceed, the 1st defendant has preferred Civil Revision Petition No. 1034 of 1930.

The 1st defendant in O S. No. 8 of 1929 subsequently filed O.S. No. 27 of 1929 in August, 1929, for enforcing the arbitration after the appointment of a fresh arbitrator in the place of the deceased one. Having regard to the view taken by the learned District Judge in Civil Miscellaneous Appeal No. 19 of 1929 (which is the subject-matter of the revision petition before us already referred to), the learned Subordinate Judge dismissed the suit. Civil Miscellaneous Appeal No. 272 of 1930 has been filed by the plaintiff in O.S. No. 27 of 1929 against the decision of the learned Subordinate Judge in O.S. No. 27 of 1929.

The substantial question for decision in the two cases being the same, they were heard together in this Court.

The decision of the dispute between the parties turns on the construction of the particular agreement, dated 31st October,

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1926, entered into by them, and on the proper meaning to be attached to paras. 17 to 19 of the second Schedule of the Civil Procedure Code.

From a perusal of the provisions contained in the second Schedule of the Civil Procedure Code, it seems to me, that when a suit is referred to arbitration when all parties interested agree to the same, the Court has got larger powers, in some respects, in order to complete and effectuate the matter of arbitration. Paragraph 1 of Schedule II enacts that where in a suit all the parties interested agree that any matter in difference between them shall be referred to arbitration they may at any time before the judgment is pronounced apply to the Court for an order of reference. The underlying idea conveyed by paragraph I of Schedule II is that the parties interested are anxious to have the suit settled by arbitration, and not by Court. The details regarding the *personnel,* etc., of the arbitration in such a case are all taken to be merely secondary and incidental to the matter, the main intention being settlement by arbitrators and not by Court. Seeing that the parties are entitled to apply, at any time in the course of the suit, even after the trial has been closed and the matter is pending judgment, to have the suit referred to arbitration, it seems reasonable that the attempt at arbitration should not prove futile and abortive simply because one of the arbitrators declined to act or one of the parties declined to appoint the arbitrator, or to proceed with the same. Settlement by arbitration being taken to be the dominant idea of the parties, the matter of details regarding appointment of arbitrators, etc., are left to be worked out by the Court in case parties do not agree. Of course if the parties agree as to the manner in which the arbitrators are to be appointed, the Court is bound to adopt that procedure (para. 2). The Court is entitled to make provisions for various matters referred to in paras. 4 and 5: where an arbitrator or an umpire dies, or where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or where the person appointed refuses to accept the office of the arbitrator or refuses to act, etc., provision is made for the Court to appoint an arbitrator after giving notice to the parties. In the case of reference to arbitration of matters in a pending suit, therefore, there is no question of reference to specified arbitrators only, in the sense that if any such arbitrators decline to act or dies, the arbitration comes to an end.

Where, however, parties agree to refer their differences to arbitration, there being no proceedings in Court at that time,

then, power is given to the parties to the agreement or to any of them to apply to the Court to have the agreement filed in Court; whereas in the case of a pending suit the consent of all the parties interested is necessary before the application could be made to the Court, for an order of reference. In the second class of cases mentioned above, such application may be made either by all the parties to the agreement, if they join in the application or by any of them. In the latter case, notice should be issued to the other parties to the agreement to show cause why the agreement should not be filed. When no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement; and it is only in cases where there are no such provisions and the parties cannot agree that the Court could appoint any arbitrator. Thus the provisions contained in the agreement regarding the arbitrators have to be followed and the Court is not entitled to go behind such provisions. This, it seems to me, is made clear by cl. (4), para. 17 of Sch. II. Paragraph 18 relating to stay of suit enacts that the Court should be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration before a suit filed after such agreement could be stayed. Paragraph 19 makes it clear that the provisions of Schedule II shall apply only so far as they are consistent with any agreement filed under para. 17. Thus, if the provisions of the second Schedule, Civil Procedure Code, are not consistent with the agreement of the parties, such provisions of the schedule shall not be applicable to such arbitration. In a case coming under paragraph 1 of the Schedule, the Court passes an order of reference to arbitration. In a case coming under paragraph 17 of the Schedule, the Court orders the agreement to be filed, and makes an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, etc. The provisions of the agreement thus govern the arbitration all through under para. 17, and the provisions contained in the second Schedule of the Code come in so far as they are consistent with the agreement filed under para. 17; whereas under para. 1 of the Schedule, the agreement between the parties brings about the order of reference, the subsequent proceedings being left to Court, the Court being directed to respect the unanimous wish of the parties in certain respects only. It should also be noticed that agreements to refer to arbitration future differences also come within the scope of para. 17.

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One can understand the reason for the difference in the policy underlying the distinction that exists in the two classes of cases mentioned above.

The question for construction of the particular agreement of the parties is one for the Court before which the question is raised. The Court should decide, after considering the terms of the agreement, whether any, and which, of the provisions in Schedule II, Civil Procedure Code, are consistent with the terms of the agreement.

In the case before us, the reference is to three specified persons. We are not able to gather that the main intention of the parties to the present cases was to have their disputes settled by arbitration in any event, and that the question of the *personnel* of the arbitrators was only a subsidiary and incidental matter. As I understand the agreement before us, it is a reference to three specified persons only, with a further provision that the award to be binding should be unanimous award of all the three.

In this view, seeing that one of the arbitrators in the present case died prior to the commencement of these proceedings in Court, I think that the present is not a case where the proceedings in the suit (O.S. No. 8 of 1929) should be stayed under para. 18 of the second Schedule, Civil Procedure Code, or where the agreement should be ordered to be filed or any order of reference made under para. 17, since the Court could not make an order of reference to the arbitrators appointed in accordance with the provisions of the agreement when one such arbitrators died prior to the commencement of proceedings in Court.

Coming to decided cases, it seems to me that the decision in *Sadiq Husain* v. *Nasir Begam*[1] does not touch this exact point. It is a decision of the Privy Council, and if the question now before us has been decided directly or even indirectly by the Privy Council, then there would be an end to all discussion. But after having carefully read that decision, I am not able to say that their Lordships have expressed any opinion on the question now before us. All that was decided in that case is this, that the expression "refusal to act" occurring in the Code includes also a case where an arbitrator never accepted the arbitration but refused to have anything to do with the arbitration, and it is not confined to the case of an arbitrator accepting the arbitration but subsequently refusing to act. If I understand the facts of the case correctly, a decree already passed by

1. (1911) L.R. 38 I.A. 181. I.L.R. 33 A. 743: 21 M.L.J. 1151 (P.C.).

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Court on compromise was to be worked out by arbitrators who were to allot to the parties properties in a compact block if possible appertaining to their shares. There was reference to arbitration regarding proceedings in a matter of which the Court had seizin already, and which should be taken only through Court. Substantially there was an order of reference by Court. It is not a case coming under para. 17 of Schedule II.

The decision in *Bala Pattabhirama Chetti* v. *Seetharama Chetti*[2] decided that the words "so far as they are consistent with any agreement so filed" occurring in section 524 of the Code of 1882 corresponding to Rule 19 of Schedule II of the present Code do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act in order that a Judge may act in conformity to it. The learned Judges held that the reasonable construction of the said provision was that the action of the Judge under section 510 should not be inconsistent with the agreement. A Bench of this Court in *Rajnayya* v. *Bapayya,*[3] on the other hand, laid down that the provisions of the schedule would apply only so far as they are consistent with the agreement filed under para. 17. In that case, one of the parties who referred their disputes to the arbitration of three named arbitrators applied to the Court under para. 17 (1) of Schedule II, Civil Procedure Code, to have the agreement filed in Court. This was done: but in making the order of reference under sub-cl. (4), the Court added a further direction that in case of disagreement among the arbitrators the opinion of the majority should prevail. The question arose whether the said direction was legal or not, as it was not consistent with the agreement which was construed to require the unanimous decision of all the three arbitrators (and not simply of a majority) in order that the award may be binding on the parties. The learned Judges held that the Court could not give any directions which are not consistent with the agreement to arbitration. The reasoning of this decision directly applies to the case before us, and the provisions of paras. 1 to 17 of Schedule II would apply only so far as they are consistent with the agreement filed under para. 17 of the Schedule. As we construe the agreement before us, the provisions of the 2nd Schedule are not consistent with the agreement, regarding the appointment of fresh arbitrators by Court. The agreement was to refer to the arbitration of three

2. (1894) I.L.R. 17 M. 498. 3. (1926) 51 M.L.J. 440.

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specified persons. There is no provision as to what is to happen in case if any of the three died. In such a case, the Court has no jurisdiction to appoint an arbitrator in lieu of one who died, and consequently a suit filed by a party to the agreement should be tried by the Court. See *Ramayya* v. *Bapayya*[3] and the English decisions referred to therein, and *Jaitum Bi* v. *Nabi Saheb*.[4]

The decision in *Mohan Lal* v. *Damodar Das*,[5] *Ma Bu U* v. *Maung Pe Lat*[6] and *Brooke* v. *Surdayal*[7] were also referred to as supporting the above view.

The decisions of the Allahabad High Court do not seem to be uniform—see *Ahmad Nur Khan* v. *Abdur Rahman Khan*,[8] *Bhagwan Das* v. *Gurdayal*[9] and *Fazal Ilahi* v. *Prag Narain*.[10]

The only decision of the Bombay High Court to which our attention was drawn *Laxman* v. *Manjunath*[11] supports the view I am inclined to take. There the agreement provided for arbitration by two specified persons. Subsequently one of the arbitrators expressed his unwillingness to act. A suit having been instituted by one of the parties, an application for stay of the suit was made to Court under para. 18 of the 2nd Schedule. The Lower Court having held that the suit was barred by the agreement to refer it to arbitration stayed the suit. The High Court reversed that order, being of opinion that the Lower Court should have removed the stay and decided the suit on its merits. Sir Norman Macleod, C.J. and Justice Shah observed as follows:—

"The other arbitrator stated that he refused to act as an arbitrator. A case, therefore, had arisen for an application to the Court to remove the stay of the suit if the parties did not come to an arrangement to remove the difficulties which had arisen, so as to enable the arbitration to proceed. Here the suit was stayed to enable the arbitration to proceed. Facts were proved to show that there were difficulties in the way of the arbitration proceedings. However, it is obvious that the Court ought to have proceeded to deal with the suit and decide it on its merits, as the arbitration had become impossible owing to the parties failing to agree to any particular course being followed after one arbitrator refused to act"

The High Court accordingly directed that the suit should not be stayed but tried by the Lower Court and disposed of in accordance with law. The case before us is substantially on all

3 (1926) 51 M.L.J. 440
4 (1912) 24 M.L.J. 15.
5. (1918) 44 I.C. 866.
6 (1917) 42 I.C. 911
7. (1874) 12 Beng L.R. App. 13.
8. (1919) I.L.R. 42 A 191.
9 (1921) 19 A.L.J. 823.
10. (1922) I.L.R. 44 A 523.
11. (1921) I.L.R. 45 B. 181.

fours with the case before the Bombay High Court though the question is not discussed in that case.

The only decision of the Calcutta High Court to which our attention was drawn is that reported in *Shasimukhi Debi* v. *Parbaty Sunkar Roy*.[12] Facts are not fully clear from a perusal of the report, but so far as one could gather the Court would seem to have been of the opinion that the agreement of the parties should prevail in such cases. However, too much reliance could not be placed on this case for the reasons stated already.

The present is not a case, where one of the parties to the agreement revoked the agreement without just and sufficient cause, so the decisions reported in *Pestonjee Nusserwanjee* v. *Manockjee & Co.*[13] and *Perumalla Satyanarayana* v. *Perumalla Venkatarangayya*[14] do not, in my view, apply. No doubt a mere arbitrary revocation by one party of the authority will not be permitted. Further, the death of the arbitrator in this case occurred before any proceedings were taken in Court, and before any order of reference was made by Court. The basis of the decision of the Privy Council in the case reported in *Pestonjee Nusserwanjee* v. *Manockjee & Co.*[13] seems to be that the agreement of the parties in that case was taken really to incorporate the provisions of section 326 also of the Civil Procedure Code relating to arbitration, though it expressly referred only to section 327 of the Code (Act VIII of 1859).

In my view the balance of authority is in favour of the view that the provisions of paras. 1 to 16 of 2nd Schedule could not be applied to an arbitration outside Court, except in so far as they are consistent with the provisions of the agreement between the parties filed under para. 17.

We have already come to the conclusion that on a proper construction of the agreement before us, it is a reference to the arbitration of three specified persons. One of the said three specified persons having died, the Court could not refer the matter to the arbitrators as provided in the agreement of the parties; and the Court had no power itself to appoint an arbitrator in such a case in the place of the arbitrator who is dead. The suit filed by the other party to the agreement in the ordinary Civil Court could not in such a case be stayed under para. 18 of Schedule II, as the arbitration could not go on in the circum-

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12 (1918) 50 I.C. 879. 13. (1868) 12 M.I.A. 112.
14 (1903) I.L.R. 27 M. 112: 13 M.L.J. 311.

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stances, as the parties declined to appoint an arbitrator in the place of the one who died.

We therefore uphold the order of the Lower Court for the reasons mentioned above, and dismiss the Revision Petition No. 1034 of 1930. For similar reasons the Miscellaneous Appeal No. 272 of 1930 will also be dismissed. We make no order as to costs in these cases in the circumstances. C.M.P. No. 2485 of 1930 is dismissed.

Sundaram Chetty, J.

Sundaram Chetty, J.—The appellant and the respondent are brothers. They executed an agreement (Muchilika), dated 31st October, 1926, in favour of three specified arbitrators, referring their disputes regarding the partition of their joint family properties to the arbitration of the said three persons, and agreeing to abide by their decision. The arbitration was proceeded with to some extent, but before its completion one of the arbitrators died. Thereupon, the respondent (Muthyala Ramachandrappa) filed O.S. No. 8 of 1929 for partition of the joint family properties, impleading his brother, the present appellant as the 1st defendant. In the course of that suit, the 1st defendant put in an application under para. 18 of Schedule II, Civil Procedure Code, for a stay of the suit. (I.A. No. 96 of 1929.) The learned Subordinate Judge passed an order on 13th August, 1929, directing the stay of the suit for a specified time. Against this order, an appeal was preferred by the present respondent (the plaintiff in the suit) and the learned District Judge set aside the order staying the suit, and dismissed the application, holding on the strength of the decision in *Jaitum Bi* v. *Nabi Saheb*[4] that the reference to arbitration became inoperative and of no effect on the death of one of the arbitrators, there being no provision in the agreement to appoint a substitute, if some such contingency should arise. Against this order, the present Civil Revision Petition has been filed. In view of this order of the learned District Judge, the application by 1st defendant under para. 17 of Sch. II, Civil Procedure Code, to have the agreement filed and a reference made to the arbitrators (which was numbered as a suit) was also dismissed by the Subordinate Judge. Against that order of dismissal, the 1st defendant has filed the present C.M.A. In both, the questions involved are substantially the same.

Exhibit I is the agreement to refer the disputes to the three arbitrators specified therein, for effecting the partition of the joint family properties. The parties agree to abide by their

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4 (1912) 24 M.L.J. 15.

decision. There is no provision in the muchilika for the appointment of substitutes, in case of death of any of them, or if any of them refuses to act. In this case, it is admitted that one of the arbitrators named in Exhibit I had died before the application was made under para. 17 of Schedule II for an order that the agreement be filed in Court.

The question involved in both these cases is almost the same. In order to direct the stay of trial in O.S. No. 8 of 1929, under para. 18, the Court must be satisfied that there is no sufficient reason to decline to refer the matter in accordance with the agreement (Ex. I) to refer to arbitration. With respect to the application under para. 17, if no sufficient cause is shown why the agreement should not be filed, the Court should order the agreement to be filed, and make an order of reference to the arbitrator or arbitrators appointed in accordance with the provisions of the agreement. Now that one of the arbitrators named in the agreement is dead, is the application under para. 17 for an order contemplated therein sustainable, and is the Court bound to make an order staying O.S. No. 8 of 1929?

Learned arguments have been addressed by the advocates on both sides and the difficulty of deciding this question is enhanced by the conflict of views expressed in judicial decisions. Before referring to those decisions, I wish to make a few observations. The Court's jurisdiction to order a reference to arbitration is derived from the agreement of the parties, and an order of reference has to be made by the Court in accordance with the provisions of the agreement, and, at any rate, it should not be inconsistent with the intention of the parties disclosed by the agreement on a proper construction of its terms. That being so, it seems to me, that one way of showing sufficient cause why the agreement should not be filed (within the meaning of para 17) would be, that on account of the happening of a contingency, or an account of altered circumstances subsequent to the agreement, it would not be possible to the Court to make an order of reference in accordance with such intention. Where the agreement is to refer the matter to the decision of three named arbitrators, and one of them subsequently dies, if on an application by one party under para. 17, when opposed by the other party, the Court chooses to order the agreement to be filed and make an order of reference to the remaining two arbitrators, such a reference would not be in accordance with the provisions of the agreement. Until after the order of reference is made, the Court cannot apply para. 5 and exercise the power of appoint-

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ing a new arbitrator in the place of the arbitrator who has died or refused to act. This is clear from para. 19 of the 2nd Schedule which runs thus:

"The foregoing provisions, so far as they are consistent with any agreement filed under para 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon"

The Court not having the power to appoint a new arbitrator in the place of the one who died or refused to act, before making the order of reference under para. 17, it must be taken that sufficient cause is shown for holding that an order of reference could not be made to the arbitrators appointed in accordance with the provisions of the agreement. (*Vide* cl. 4 of para. 17.) It must also be noted that there is no provision in Ex. I for the appointment of new arbitrators in case of death or refusal to act of one or other of the arbitrators specified therein. If what I have stated above is the correct view, on a strict interpretation of the provisions of paras. 17, 18 and 19 of the 2nd Schedule, the order of the learned District Judge refusing to stay the suit, and the order of the learned Sub-Judge, dismissing the application put in under para. 17, must be taken to be correct.

A number of decisions relied on by the learned advocate for the respondent go to support the view I have taken. In the case in *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*[15] the agreement was to refer the matter to two named arbitrators or their umpire. It was held that if there was no subsisting agreement to refer capable of being carried into effect, the proceedings in the suit could not be stayed under section 11 of the Common Law Procedure Act, 1854. This principle was followed by a Division Bench of this Court in *Jaitum Bi* v. *Nabi Saheb.*[4] The agreement in that case was to refer the matter to three named arbitrators, without any provision in the muchilika for the appointment of new arbitrators in their place. Two of them having declined to arbitrate, it was held that the agreement ceased to be operative and therefore did not bar the suit. In a recent decision in *Ramayya* v. *Bapayya*[3] the learned Judges have construed an agreement to refer the matter to three named arbitrators (similar to Ex. I) as implying an intention to be bound by the decision of all the three and not merely of a majority, and in

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3. (1926) 51 M.L.J. 440. 4 (1912) 24 M.L.J. 15.
15. (1887) L.R. 20 Q.B.D. 177.

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this view it was held that the Court had no power to order under para. 4 that the parties should abide by the decision of the majority, because according to para. 19 the provisions of paras. 4 and 5 could be applied only so far as they are consistent with the agreement filed. If, according to the construction of the agreement adopted in the aforesaid decision, the parties wanted to abide by the decision of all the three specified arbitrators, any reference made by the Court to two of them only or after substituting a new arbitrator in the place of one who subsequently died, would not be valid, as it would not be consistent with the provisions of the agreement.

The contention of the respondent is lent support by the decisions of some other Courts also. The case in *Brooke* v. *Surdayal*[7] was decided under the old Code (Act VIII of 1859). Two points were decided. One is that the power of appointing a new arbitrator in the place of one who refused to act could not be exercised under section 319 before making the order of reference. The other is, that by reason of one of the arbitrators named in the agreement having refused to act, the agreement to refer to arbitration as intended by the parties no longer subsists so as to enable the Court to direct that it should be filed. (Vide also *Ma Bu U* v. *Maung Pe Lan*[6]). In another case decided by the Punjab Chief Court, an agreement to refer to five named arbitrators (without any provision for substituting fresh arbitrators) was held to be inoperative by the death of two of them, before the application was made for filing the agreement in Court. This was regarded as a sufficient reason for refusing to file the agreement under para. 17 (*Mohan Lal* v. *Damodar Das*[5]). The same view has been expressed by the Lahore High Court in *Sri Ram* v. *Sorabji*.[16] But in that case there was a distinct provision in the agreement itself that in case of resignation or death of any arbitrator named therein, another may be appointed in his place. In the case reported in *Ahmad Nur Khan* v. *Abdur Rahman Khan*[8] the application under para. 17 for an order that the agreement be filed was dismissed, as the arbitrator refused to act for some reason.

On behalf of the appellant, some decisions were relied on as supporting his contention. Two of them are the decisions of the Allahabad High Court. In the case reported in *Bhagwan*

5. (1918) 44 I.C. 866. 6 (1917) 42 I.C. 911.
7 (1874) 12 Beng L.R. App. 13.
8. (1919) I.L.R. 42 A. 191. 16 (1919) 51 I.C. 636.

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Das v. *Gurdayal*,[9] one of the three named arbitrators is alleged to have declined to act. Then one of the parties filed an application under para. 17 to have the agreement filed and a reference made. The learned Judges seem to concede that the Court has no power to utilise the provisions of para. 5, where no order of reference has been made under para. 17. But the fact of one of the three arbitrators refusing to act is taken to be no bar to the Court passing an order under para. 17. It is observed, that an order of reference should be made under para. 17, to pave the way for the next step which is the appointment of another arbitrator. But it seems to me that such an order of reference (more clearly in the case of death of one of the arbitrators), cannot be deemed to be warranted by cl. (4) of para. 17 if its terms are strictly construed. The view taken in the above case has been fully endorsed in the decision in *Fazal Ilahi* v. *Prag Narain*.[10] Reliance has been placed on the decision of the Privy Council in *Sadiq Husain* v. *Nazir Begam*.[1] If the facts in that case are carefully considered, it would appear that the agreement of the parties to refer the matter of settling and allocating the shares, etc., to two arbitrators was the razinamah petition filed in Court on which a decree was passed. This itself amounts to the Court having filed the agreement. Then, one of the arbitrators declined to act. It was held that the Court should have appointed another arbitrator under section 510 of the old Civil Procedure Code (Act XIV of 1882). That was not strictly a case of an application for the filing of the agreement in Court after one of the arbitrators had refused to act. This decision of the Privy Council does not really help the appellant's contention in the present case. There remains the decision in *Bala Pattabhirama Chetti* v. *Seetharama Chetti*.[2] It turned mainly on the construction of the words "so far as they are consistent with any agreement so filed" occurring in section 524 of the old Civil Procedure Code (corresponding to para. 19 of the 2nd Schedule of the present Code). According to the view taken in that case, section 524 should be read as if it contained the words "in the absence of anything in the agreement to the contrary," but a different view has been taken in the matter of construing a similar agreement with reference to para. 19 of the 2nd Schedule in the later decision of this High Court in *Ramayya* v. *Bapayya*.[3]

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1. (1911) L.R. 38 I.A. 181: I.L.R. 33 A 743: 21 M.L.J. 1161 (P.C.).
2. (1894) I.L.R. 17 M 498.
3. (1926) 51 M.L.J. 440.
9. (1921) 19 A.L.J. 823.
10. (1922) I.L.R. 44 A. 523.

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As regards the construction of the agreement (Ex. I) reliance has been placed on the decision of the Privy Council in *Pestonjee Nusserwanjee* v. *Manockjee & Co.*[13] In that case, their Lordships had to deal with the jurisdiction of the Court under section 326 of the old Code (Act VIII of 1859) to direct an agreement of parties to arbitration to be made a rule of Court. It was held that no party to the agreement can revoke the submission to such arbitration, unless for good cause. In construing that agreement, their Lordships have remarked, that the submission to the arbitration must be deemed to be under and subject to the sections contained in the Code relative to the subject, unless the provisions of the Code were expressly excepted by the parties to the agreement. (*Vide* p. 130.) The view taken in *Bala Pattabhirama Chetti* v. *Seetharama Chetti*[2] is in accordance with this principle. Section 326 referred to in the judgment of the Privy Council corresponds to paras. 17 and 19 of the 2nd Schedule to the present Code. Adopting the rule of construction of the agreement as laid down by the Privy Council, the parties to Ex. I should be deemed to have agreed to abide by the provisions of paras. 17 and 19, inasmuch as there is no express provision in the agreement indicating that these provisions were excepted by the parties. Taking this agreement to be subject to the provisions of para. 19, the Court can exercise the power of appointing a fresh arbitrator in the place of the deceased arbitrator under para. 5, only after the order of reference has been made under para. 17. There is no provision in para. 17 empowering the Court to make such an appointment before the agreement is made a rule of Court and an order of reference is actually made. Thus it is clear, that even on the construction of the agreement in this case, in the aforesaid manner, the Court cannot fill up the vacancy, by appointing a substitute, before ordering the agreement to be filed.

The next question is, whether under para. 17 the Court can order the agreement to be filed, in spite of the death of one of the three arbitrators named therein, and make an order of reference to the two surviving arbitrators alone. Would this be in accordance with what is laid down in cl. (4) of para. 17? The words in this clause "and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator" indicate to my mind, that when the agreement is to refer the matter to a

2. (1894) I.L.R. 17 M. 498.

13. (1868) 12 M.I.A. 112.

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named arbitrator, or named arbitrators, the Court shall make an order of reference to such arbitrator or arbitrators, but where the agreement has not *named* the arbitrators, it should be taken that there is no such provision in the agreement as to limit the appointment to a specified person or persons, in which case the Court itself may appoint an arbitrator or arbitrators, if the parties cannot agree as to the *personnel,* and then make an order of reference. That this is so would be clearer from the corresponding clause in section 523 of the previous Code, viz., "and shall make an order of reference thereon, and may also nominate the arbitrator when he is not *named* therein and the parties cannot agree as to the nomination."

The position in the present case, in view of the terms of Ex. I, comes to this. The Court cannot make an order of reference to two out of the three *named* arbitrators in Ex. I, for such an order would not be in accordance with the provisions of the agreement (within the meaning of clause (4) of para. 17). Nor has the Court power to appoint a fresh arbitrator in the place of the deceased man, unless an order of reference has been made under para. 17. When the Court is thus unable to order the agreement to be filed and make an order of reference under clause (4) of para. 17, the application made under this paragraph has to be dismissed.

The preponderance of authority is in favour of the contention put forward by the respondent. I have to state with due respect that the view expressed in the two decisions of the Allahabad High Court relied on by the appellant is one I am unable to accept as the provisions of paras. 17, 18 and 19 of the 2nd Schedule have to be strictly complied with.

For these reasons, I agree with my learned brother, in dismissing the C.M.A. and the C.R.P. As to costs, I agree with the order made by him.

S.R. *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Duraiswami Naicken and another *Appellants** (*Accused*).

Duraiswami Naicken, *In re.*

Criminal Procedure Code (V of 1898), S 298—Offence of dacoity—Essentials—Explanation of law by Judge to jury—Defective summing up—Omission to point out effect of possible acquittal of some accused—Conviction if vitiated

Where the accused are charged for the offence of dacoity the Judge should tell the jury that it is essential in order to convict the accused that hurt or wrongful restraint should have been caused for the purpose of the theft. He should further tell the jury that they must be satisfied that it was the common intention of all the persons charged to commit robbery and that they were acting conjointly And when five or more persons are charged for the offence, but some of them are acquitted so as to bring the number of accused found guilty to less than five, it is incumbent on the Judge to explain to the jury that the effect of their verdict was that dacoity had not been committed

Where in a case of housebreaking by night and dacoity the Judge wrongly directed the jury as to the law and further omitted to direct them with regard to the possible acquittal of three out of six accused persons,

Held, that the conviction of the other persons who were found guilty was vitiated by the misdirection to the jury and should be set aside

Appeal against the order of the Court of the Assistant Sessions Judge of the Chingleput Division in Case No. 3 of the Calendar for 1930.

V. L. Ethiraj and *G. N. Tirumalachari* for appellants in Criminal Appeal No. 169 of 1930.

P. S. Narayanaswami Aiyar for appellant in Criminal Appeal No. 183 of 1930.

The Acting Public Prosecutor (*K. N. Ganapathi*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The three appellants were charged with three other persons before the Assistant Sessions Judge of Chingleput Division with the offence of housebreaking by night and dacoity on the night of the 17th October, 1929. The jury returned a unanimous verdict of guilty against the appellants in respect of both the charges but acquitted the other accused. The appellants were sentenced to five years' rigorous imprisonment in respect of each of the convictions, the sentences to run concurrently.

The points taken here by Mr. Ethiraj in these appeals are that the Trial Judge wrongly directed the jury as to the law, in that he

*Cr. Appeals Nos. 169 and 183 of 1930. 14th August, 1930

did not tell them correctly what the offences of robbery and dacoity consisted of, and further that he did not direct the jury with regard to the possible acquittal by them of some of the accused which would reduce the number of the persons present to below five, that they would have to consider whether there were other persons—unidentified persons—in order to justify a conviction of the remaining accused persons for the offence of dacoity. Mr. Ethiraj further complains that in his charge to the jury the Assistant Sessions Judge has not put many of the facts in the case favourable to the defence.

Dealing with the first point, in charging the jury with regard to the offence of robbery, the learned Assistant Sessions Judge said:

> "When in committing the theft or in carrying away property, a person voluntarily causes hurt or wrongful restraint, the offence amounts to robbery."

He is there defining robbery. He then goes on to say:

> "If five or more persons take part in the offence, it amounts to dacoity That is one of the charges in this case."

Now, dealing with his definition of the law with regard to robbery, the criticism made is that the learned Assistant Sessions Judge did not tell the jury that it was essential, in order to convict the accused of the offence of robbery, that hurt or wrongful restraint should have been caused for the purpose of the theft. What, it is said, the learned Assistant Sessions Judge has done is to leave it open in the mind of the jury that they were entitled to convict the accused persons of robbery even if merely in the course of committing theft some violence or wrongful restraint was caused to others We have been referred to a decision of a Bench of this Court, *Karuppa Goundan* v. *Emperor*,[1] a decision of Spencer and Napier, JJ. There it was decided that, to constitute the offence of dacoity it is necessary that death or hurt or wrongful restraint or fear of such instant evil should be caused by the offenders not only in order to the committing of theft or in committing theft, or in carrying away property obtained by theft, but also *for that end,* and that five or more persons should be acting conjointly. That of course is almost setting out word for word the words of the section, but that case is a clear decision and it follows two decisions of the Calcutta High Court, namely, *Otaruddi Manjhi* v. *Kafiluddi Manjhi*,[2] and *King-Emperor* v. *Mathura Thakur*.[3] These cases clearly lay down that it is essential in order to convict persons charged with the offence of robbery that it should be shown not

1. (1916) 38 I.C. 730. 2. (1900) 5 C.W.N. 372.
3. (1901) 6 C.W.N. 72 at 79.

only that violence or hurt or wrongful restraint was caused during the committing of the theft but also that it must be caused for the purpose of enabling theft to be carried out. It is unnecessary for us to say whether the decision of this High Court already referred to is right to the full extent to which it goes. According to the judgment in that case it is necessary for the Judge in charging the jury to tell them that hurt or wrongful restraint must be committed for that end in addition to telling them that it must be committed in order to the committing of robbery or in committing robbery. It is unnecessary for us to consider that case except to say that it does lay down that the jury must be told that it must be proved that hurt or wrongful restraint was caused for the purpose of enabling the robbers to commit robbery or theft. In this case the proper direction was not given to the jury by the learned Assistant Sessions Judge.

Then there is a further point that he did not tell the jury that they must be satisfied that it was the common intention of all these persons charged to commit robbery and that they were acting conjointly. The learned Assistant Sessions Judge contents himself with saying:

"If five or more persons take part in the offence, it amounts to dacoity."

That, we think, is an insufficient direction to the jury.

Then we come to another objection, namely, that, as the trial resulted in the acquittal of three of the accused leaving only three convicted persons, the jury should have been told, or it should have been explained to the jury, that the effect of that verdict was that the offence of dacoity had not been committed. Without going so far as to say that it is right or proper for a Trial Judge to ask questions of the jury as to their reasons after they have arrived at a decision, we certainly think that in a case such as this it should have been explained to the jury what the effect of the verdict was and it should have been pointed out to them that, in order to return a verdict of *guilty* of dacoity against the three convicted persons, they must be satisfied in their minds that there were at least two other persons present when the offence was committed. The learned Assistant Sessions Judge did not ask them to bear that matter in mind and we think that here also he went wrong.

In these circumstances it does not seem to be necessary for us either to set out the facts of the case or to express any opinion as to whether his dealing with the facts of the case in his charge to the jury was or was not satisfactory. We have come to the conclusion that the conviction of the accused in this case must

Duraiswami Naicken, *In re.*

be set aside in respect of both the charges. Their bail bonds will be cancelled.

B.V.V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Nandipati Ramireddi and another .. *Petitioners* (Accused).*

In re Ramireddi.

Trial in criminal case—Defence anticipated by accused before charge—Trial Court receiving petitions and writing orders thereon—Revision—Practice.

An accused person must wait till he is charged before he defends himself, and if he is convicted his first remedy is in most cases by way of appeal.

The complainant in this case filed a complaint against the accused under Ss. 447, 323 and 325, Indian Penal Code, in the Sub-Magistrate's Court of Pamarru in the Kistna District. The accused petitioned to the Court for the examination of some witnesses to prove that the offences were compounded. In the absence of the complainant, the Court heard the evidence of two witnesses let in by the accused, and found that as there were no composition of the offences completed according to S. 345 of the Criminal Procedure Code, dismissed the petition. This Criminal Revision Petition was filed against that order of dismissal, and the following judgment was delivered in admission.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Sub-Magistrate of Pamarru, dated 1st December, 1930 and made in Calendar Case No. 228 of 1930.

V. Pattabhirama Sastri for petitioners.

The Court delivered the following

JUDGMENT.—It seems that an entirely wrong system of procedure is developing in the Lower Courts. Accused persons before they are charged and put upon their defence anticipate their defence by petitions on which the trial Court writes written orders, and these are then brought up on revision. The procedure is quite misconceived. An accused person must wait till he is charged before he defends himself, and if he is convicted his first remedy is in most cases by way of appeal. At this stage there is no room for revision.

The Criminal Revision Petition is dismissed.

K.C. *Petition dismissed*

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*Cr.R.C. No. 914 of 1930 and Cr.R.P. No. 848 of 1930. 17th December, 1930

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Sudra Nadan .. *Appellant** (*Defendant*)

v.

Annamalai (dead) and others .. *Respondents* (*Plaintiff and her legal representatives*).

Sudra Nadan *v.* Annamalai.

Minor—Indian Christian—De facto *guardian—Alienation by—Validity of—Suit to set aside—Limitation Act* (*IX of* 1908), *Art.* 44—*Applicability.*

A sale by the *de facto* guardian of an Indian Christian minor is absolutely void and a suit to set it aside is not governed by Art. 44 of the Limitation Act. *Mata Din* v. *Ahmad Ali,* (1911) L.R. 39 I.A. 49: I.L.R. 34 All. 213: 23 M.L.J. 6 (P.C.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tiruvalur in Appeal Suit No. 62 of 1925 (A.S. No. 69 of 1925 on the file of the District Court of East Tanjore at Negapatam) preferred against the decree of the Court of the District Munsif at Tiruvarur in O.S. No. 307 of 1924 (O.S. No. 123 of 1923 on the file of the Court of the District Munsif of Negapatam).

A. Ramaswami Aiyangar for appellant.

E. Vinayaka Rao for respondents.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. This Second Appeal arises out of a suit instituted by the plaintiff for partition and possession of the plaint property. The property belonged to the plaintiff and her sister, and during the minority of the plaintiff it was sold by one Sanjeevi Nadan, the husband of another sister of the plaintiff. The plaintiff's case is that the sale is not binding on her as Sanjeevi Nadan was not her guardian in law and that she is therefore entitled to recover possession of the property. The defendant, the purchaser of the property, contended that the sale is binding, that it was for a necessary and proper purpose that the property was sold and that the plaintiff's suit is barred by limitation. The Lower Court found that Sanjeevi Nadan, though a *de facto* guardian, was not the proper guardian of the plaintiff, that it was not proved that the plaintiff was benefited in any way by the sale of the property and that the suit was not barred by limitation. The finding of the learned Subordinate Judge that the plaintiff was not benefited by any portion of the money paid by the defendant is a finding of fact and is binding on me in Second

*S.A. No 180 of 1927. 21st January, 1931.

Sudra Nadan v. Annamalai.

Appeal. So the only two questions remaining for consideration are whether the sale by the *de facto* guardian in this case is binding on the plaintiff and whether the suit is barred by limitation. The question of limitation would depend upon whether Sanjeevi Nadan for the purposes of the sale is to be considered as a proper guardian of the plaintiff or as only an unauthorised person interfering with the plaintiff's property; for, if he can be considered to be a person entitled to deal with the minor's property, then Art. 44 would apply.

The plaintiff is an Indian Christian. It is argued on her behalf that under the personal law of the parties Sanjeevi Nadan is not her proper guardian and therefore the sale by him should be considered to be a sale by an unauthorised person. The argument is that for that reason the sale is an absolutely void transaction. Under the Hindu Law it has been held in a series of cases that a sale by a *de facto* guardian on behalf of a minor is a voidable transaction and that Art. 44 of the Limitation Act would apply. That was also the position under the Mahomedan Law till the Privy Council finally decided that sales by *de facto* guardian under the Mahomedan Law are void transactions in *Mata Din* v. *Ahmad Ali*.[1] It has now been finally held in the case of persons governed by the Mahomedan Law following this decision (see *Imambandi* v. *Mutsaddi*[2]) that sales by *de facto* guardian under the Mahomedan Law are void transactions. There does not appear to be any decided case with reference to the point as to who the guardians of an Indian Christian would be. In Trevelyan on Minors, 6th Ed., at p. 60, it is stated:

> "Failing the father and mother, and their appointees, no person, however nearly related, is of right entitled to the custody of minors, who are neither Hindus nor Mahomedans, or the guardianship of their property."

Again at page 167 it is stated:

> "The law applicable to persons other than Hindus and Mahomedans does not permit guardians, other than those appointed by the Court, or having power given to them by the instrument appointing them, to sell or charge the immovable property of their wards."

If these extracts represent the correct state of the law applicable to communities other than Hindus and Mahomedans, it must follow that in this case the plaintiff being a Christian, the transaction in question should be void.

Mr. Vinayaka Rao on behalf of the respondent has drawn my attention to *Mata Din* v. *Ahmad Ali*[1] to show that even

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1. (1911) L.R. 39 I.A. 49: I.L.R. 34 A. 213: 23 M.L.J. 6 (P.C.).
2. (1918) L.R. 45 I.A. 73: I.L.R. 45 C. 878: 35 M.L.J. 422 (P.C.).

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though it is a decision under the Mahomedan Law, the observations of their Lordships are general and may well be relied upon in support of the contention that an alienation by a *de facto* guardian of an Indian Christian is also like the alienation of a Mahomedan *de facto* guardian. The paragraph referred to is this:

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property but he cannot thereby clothe himself with legal power to sell it."

The observations seem to be general; but they were made in connection with a case in which the parties were Mahomedans. It may be doubtful whether, having regard to the facts of the case, these observations can be given an extended application. However, it must be noticed that Kumaraswami Sastri, J. in this Court in *Ramaswami* v. *Kasinatha*[3] was inclined to apply these observations generally; and he stated relying on the two Privy Council decisions in *Mata Din* v. *Ahmad Ali*[1] and *Imambandi* v. *Mutsaddi*,[2] that if the matter was *res integra* he would on the observations of Lord Robson be prepared to hold even under the Hindu Law alienations by *de facto* guardians are absolutely void; but having regard to the trend of decisions under the Hindu Law on the principle of *stare decisis* the learned Judge was not inclined to give an extended application to the observations of the Privy Council. If the observations of the learned Judges of the Privy Council can be understood as applicable to the case of alienations by *de facto* guardians, irrespective of the question whether the parties are Mahomedans, Hindus or Christians, then, certainly these observations support the contention of the respondent. Having regard to the authorities I have referred to, I must uphold the decision of the Lower Court that the alienation in this case is a void transaction and not binding on the plaintiff. If it is a void alienation, then, it is clear that Art. 44 of the Limitation Act has no application, and as the plaintiff's suit has been brought within 12 years after the alienation, it is not barred by limitation.

In the result the decision of the Lower Court is right and this Second Appeal is dismissed with costs.

S.R. — *Appeal dismissed.*

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1. (1911) L.R. 39 I.A. 49 I.L.R. 34 A. 213 23 M.L.J. 6 (P.C.).
2. (1918) L.R. 45 I.A. 73. I.L.R. 45 C 878: 35 M.L.J. 422 (P.C.).
3. A.I.R. 1928 Mad. 226.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Grandhi Pothanna .. *Petitioner** (*Plff.*)

v.

Simhadri Satyananda Charyulu and another .. *Respondents* (*Defts.*).

Grandhi Pothanna *v.* Satyananda Charyulu.

Court Fees Act (VII of 1870), S 7, cl (ix)—Suit for redemption of usufructuary mortgage—Additional claim for recovery of surplus profits—Court-fee payable—Suits Valuation Act (VII of 1887)—Suit to redeem mortgage—Jurisdictional value.

Where in a suit for redemption of a usufructuary mortgage the mortgagor seeks to recover not only the *corpus* of the property but also the surplus profits which accrued therefrom and which were realised by the mortgagee in excess of what was due to him, the suit may be deemed to be one for the recovery of the mortgaged property within the meaning of S. 7, cl (*ix*) of the Court Fees Act and the proper Court-fee payable by the plaintiff is on the principal amount secured by the mortgage bond and not also on the amount of surplus profits sought to be recovered

Husaini Khanam v. *Husain Khan*, (1907) I.L.R. 29 All. 471 and *Chhiddu Singh* v *Jhaujhan Rai*, (1922) I.L.R. 45 All 154, followed

Kodi Venkatappa Row v. *Bandla Suryanarayana*, (1912) 12 M.L.T. 493, considered.

In a suit for redemption of a mortgage and for recovery of surplus profits from the mortgagee the valuation for purposes of jurisdiction is determined by the principal amount of the mortgage.

Zamorin of Calicut v. *Narayana Bhatta*, (1882) I.L.R. 5 Mad. 284 (F.B.) and *Jallaldeen v. Vijayaswami*, (1915) I.L.R. 39 Mad. 447: 29 M.L.J 142, followed.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Vizagapatam, dated 31st March, 1930, in O.S. No. 53 of 1928.

Y. Suryanarayana for petitioner.

P. Somasundaram for respondents.

The Court delivered the following

JUDGMENT.—This revision petition has been filed by the petitioner-plaintiff against the order of the Subordinate Judge of Vizagapatam directing him to pay additional Court-fee in a suit for redemption of a mortgage brought by him. The plaintiff is the mortgagor. He now seeks to redeem the usufructuary mortgage created by him and to recover possession of the immovable property together with surplus profits which the mortgagee is alleged to have derived from out of that property in excess of what was due to him towards the principal and interest.

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*C.R.P. No. 821 of 1930. 24th February, 1931.

Grandhi Pothanna v. Satyananda Charyulu.

The principal amount of the mortgage bond is admittedly Rs. 1,500. The plaintiff asks for an account of the profits and estimates the amount of surplus profits due to him at Rs. 5,654. He has paid Court-fee on the sum of Rs. 1,500 which is the principal amount of the mortgage bond. The learned Subordinate Judge states that the right to redeem is distinct from the right to recover the profits and therefore Court-fee should be paid on the amount of the profits also.

Under R. 9 of O. 34 of the Code of Civil Procedure in a suit for redemption of a possessory mortgage the Court may order an account to be taken of the profits in respect of the immovable property mortgaged and pass a decree in favour of the mortgagor for any amount found to have been received by the mortgagee as surplus profits over and above what was legitimately due to him It is clear that a suit for redemption is a suit not only for the recovery of possession of the property but also of the surplus profits due to the mortgagor. That is the view taken by the Allahabad High Court in a number of decisions (vide *Husaini Khanam* v. *Husain Khan*[1] and *Chhiddu Singh* v. *Jhanjhan Rai*[2]). A suit of this kind was regarded as a suit for redemption coming within the purview of S. 7, cl. (*ix*) of the Court Fees Act and the Court-fee payable in such a case would be regulated by the principal amount of the mortgage bond. According to this view, it must be held that the plaintiff has paid the requisite Court-fee. The learned Subordinate Judge is in error in stating that the right to redeem is distinct from the right to recover profits. On the other hand, the right to recover profits is incidental to the right to redeem a mortgage and cannot be said to be a distinct right unconnected with the right to redeem. But the difficulty is created by the wording of cl. (*ix*) of section 7 of the Court Fees Act. In the marginal note, the words used indicate that the clause covers a suit for redemption of a mortgage. But the wording in the clause itself is as follows: "In suits against a mortgagee for the recovery of the property mortgaged." In construing this clause, a Division Bench of this Court in a case reported in *Kodi Venkatappa Row* v. *Bamala Suryanarayana*[3] has observed that according to the language of this clause a suit for the recovery of possession of the mortgaged property is alone covered by it. Some doubt has been expressed as to whether this clause would cover a suit in which not only recovery of possession of the property is sought

1 (1907) I.L.R. 29 A 471 2 (1922) I.L.R. 45 A. 154.
3. (1912) 12 M.L.T. 493.

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but also recovery of the surplus profits. The question does not, however, seem to have been finally settled beyond expressing a doubt as to the interpretation of this clause. In the case of a simple mortgage it is observed by Sadasiva Aiyar, J., in the same decision that a suit by the mortgagor to redeem a simple mortgage would be a suit for the recovery of the property mortgaged within the meaning of this clause, because the relief to be given to the mortgagor in such a suit might be the reconveyance to him of the interest which was vested in the mortgagee. If so much could be imported into the aforesaid clause in the Court Fees Act, I may observe with great respect, especially considering the marginal note, that a suit for the redemption of a usufructuary mortgage wherein the recovery of possession of the property and also of surplus profits is claimed may well-nigh be deemed to be included in this clause. Moreover, in the case of a usufructuary mortgage, not only the *corpus* of the property but also the future profits derivable therefrom should be taken to have been secured in favour of the mortgagee for the realisation of his mortgage debt. In one sense, the property mortgaged in such a case would be the *corpus* of the property and also the future profits derivable therefrom. If in a suit for redemption the mortgagor seeks to recover not only the *corpus* of the property but also the profits which accrued therefrom and which were realised by the mortgagee in excess of what was due to him, such a suit may well be deemed to be one for the recovery of the property mortgaged within the purview of clause (*ix*) of section 7 of the Court Fees Act. I am therefore inclined to hold that the present suit is covered by cl. (*ix*) of section 7 of the Court Fees Act, and therefore the proper Court-fee payable by the plaintiff is on the principal amount secured by the mortgage bond and no additional Court-fee need be paid on the amount of surplus profits sought to be recovered after an account is taken.

The suit has been filed in the Sub-Court and the question next arising is, whether the valuation of the suit for purposes of jurisdiction would be the same as the valuation for purposes of Court-fees. A suit for redemption is not a suit covered by section 8 of the Suits Valuation Act, nor is it one of those suits in respect of which the Local Government can make rules for determining the jurisdiction value under the power vested in it by section 3 of the Act. We have therefore no guide in the Suits Valuation Act so far as the present suit is concerned. But the question is covered by authority so far as this High Court is concerned. The Full Bench decision in *Zamorin of Calicut*

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v. *Narayana Bhatta*[4] is relied on in a later case reported in *Jalaldeen Marakayar* v. *Vijayaswami*,[5] wherein the learned Judges have observed that the authority of the aforesaid Full Bench decision is unaffected by the Suits Valuation Act (VII of 1887). The view taken in both those decisions is to the effect that the principal amount of the mortgage in a suit for redemption must be taken as determining the jurisdiction under the Civil Courts Act. Following these rulings, I must hold that the principal amount of the mortgage in the present case should be taken as the criterion for determining the jurisdiction of the Court also. While holding that the plaint is properly stamped, I should direct the Subordinate Judge to have the valuation of the plaint for jurisdiction purposes amended in the aforesaid manner and, on such amendment, to return the plaint for presentation to the proper Court.

In the circumstances of the case, I would direct the parties to bear their own costs of this petition. The costs of the suit incurred in the Sub-Court will be costs in the cause.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE BARDSWELL.

Sri Raja Sobhanadri Appa Rao Bahadur v. Raja Muganti Venkatarama Rao.

Sri Raja Sobhanadri Appa Rao Bahadur Garu, Nuzvid .. *Appellant** (*1st Deft.*)

v.

Raja Muganti Venkatarama Rao and others .. *Respondents* (*Plff. and Defts.* 2 *to* 4).

Indian Registration Act (XVI of 1908), S. 28—Inclusion in document of lands not intended to be passed, in order to give jurisdiction to Registrar—Whether constitutes fraud on registration—Suit by ward to set aside sale by guardian which is not void—Applicability of Art. 44 of Limitation Act

Where the inclusion in a registrable document of a particular piece of property was merely for the purpose of giving jurisdiction to the Registrar, the true test whether S 28 has not been complied with will be, did the parties collude to commit fraud upon the registering officer, and as a further test of whether the parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that

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*Appeal No. 31 of 1925. 20th August, 1930.

4. (1882) I.L.R. 5 M. 284 (F.B.).

5. (1915) I.L.R. 39 M. 447: 29 M.L.J. 142.

Sri Raja Sobhanadri Appa Rao Bahadur *v.* Raja Muganti Venkatarama Rao.

could be conveyed by the party executant or as to which a genuine belief existed that he could convey it

Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it is not perfectly clear that it will follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention.

The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud.

Case-law discussed

If the sale is void owing to fraudulent registration there will be no need to set it aside. But if the sale deed is not found to be void then the suit has to be regarded as one for setting aside the sale-deed, even though no such relief has been sought for, in that possession cannot be obtained unless that document is set aside

Art. 44 of the Limitation Act will apply when a ward sues to set aside the sale by a guardian.

Raja Ramaswami v. *Govindammal,* (1928) 56 M.L.J. 332, followed.

Appeal against the decree of the Court of the Additional Subordinate Judge of Bezwada in O.S. No. 36 of 1923 (O.S. No. 3 of 1922, Sub-Court, Bezwada).

S. Srinivasa Aiyangar and *P. Satyanarayana Rao* for appellant.

The Advocate-General, M. Subbaroya Aiyar, M. Venkatasubbiah, V. Govindarajachari and *Y. Govindarajulu* for respondents.

The Court delivered the following

Bardswell, J.

JUDGMENTS. *Bardswell, J.*—The suit under appeal is one for recovery of possession by the plaintiff from defendant 1 of the suit property which consists of one-fourth share in the Mokhasa village of Somavaram in the Kistna District. According to the plaint, the plaintiff's father, professing to act as his guardian during his minority, purported to alienate, on 14th October, 1910, under a registered sale-deed, the suit property to the late father of defendants 1 and 2 for a cash consideration of Rs. 27,302 which was quite inadequate, while the sale itself did not purport to be for any justifiable necessity. The suit property was in the possession of the father of defendants 1 and 2 till his death in or about May, 1911, and has been in the sole possession of defendant 1 since about September, 1918, when there was a partition between him and his brother defendant 2. The plaint further sets out that there was a fraud on the registration law in that there was included in the sale-deed a vacant land belonging, not to the plaintiff but to his father, which item was not intended to be sold, was never possessed or

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Beardswell, J.

enjoyed by defendants 1 and 2 or their father and is still in the possession and enjoyment of the plaintiff's father. Its inclusion in the sale-deed was, according to the plaint, solely for the purpose of getting the sale-deed registered at an office in the Godavari District, instead of in the Kistna District. The idea in getting the document thus registered was to keep the matter from the knowledge of the plaintiff's grandfather and actual guardian the late Maharaja of Venkatagiri. The learned Subordinate Judge has found that the consideration under the suit sale-deed, Ex. I, was adequate, and cannot say that plaintiff's natural father, who has been joined in the suit as defendant 4, was not his natural guardian at the time of the execution of that document. He has, however, further found that [illegible]le in any case would not be binding on the plaintiff because it was not executed for his benefit, and that it was in fact void as there was a fraud upon the registration law in respect of it. He has therefore given a decree to the plaintiff for recovery of possession, together with mesne profits for three years before suit at the rate of Rs. 1,000 per annum. In this appeal, which is by defendant 1, the finding as to there having been a fraud on the registration law is attacked, and there are further contentions that the sale, as being one by a guardian, though not one of necessity, should be upheld as being beneficial to the minor's estate, and that the amount of mesne profits that have been allowed is excessive.

The most important point in the case is that of whether there has been a fraud on the registration law. The importance of the point is involved in the fact that upon its decision depends the decision of the further question of whether or no the suit has been brought in time. If the sale is held to be void owing to fraudulent registration then, of course, there will be no need to set it aside, and it is not disputed that the suit will have been brought well within the period of limitation. It is on these lines that the Lower Court has found the suit to be in time. But if the sale-deed is not found to be void then the suit has to be regarded as one for setting aside the sale-deed, even though no such relief has been sought for, in that possession cannot be obtained unless that document is set aside. That this is the position has been held by this Court in *Raja Ramaswami* v. *Govindammal*.[1] Now, under Art. 44 of the First Schedule on the Limitation Act, the time allowed to a ward who has attained majority for setting aside a transfer of property effected by

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1. (1928) 56 M.L.J. 332.

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his guardian is three years from when he attains his majority. The plaint in this case, which was presented on 6th December, 1921, states the age of the plaintiff as about 27, and on that showing was brought far more than three years after his attainment of majority. In his evidence, indeed, as P.W. 1, he has represented, on 14th July, 1924, that he was aged only twenty-seven even then but he admitted that he could not give his age definitely, while from what he says it would appear that he was making under-estimate of it. Even, too, if what he said in his evidence could be accepted he must have been over twenty-three when the plaint was presented, and, as he was not a ward of Court, that would make the presentation over five years after the time when he became a major.

The Lower Court has based its decision that there was a fraud on the registration law on its finding that the site at Vundoor, which was added in the sale-deed so as to make it registrable at Samalkota in the Godavari District whereas the registration office for the suit property is Tiruvur of the Kistna District, was a fictitious item which belonged neither to the plaintiff nor to his father. This finding, however, is not in accordance with plaintiff's own pleading which, as set out in the plaint, is not that this Vundoor site was fictitious but that it belonged to and was being enjoyed by plaintiff's father and that the fraud consisted in including this item in the sale-deed when there was no intention of conveying it. We may also remark incidentally that we are not satisfied on the evidence that the Vundoor site is a fictitious item. Had the case for the plaintiff been that this item was fictitious and had that case been made good, then, no doubt, the learned Subordinate Judge would have been correct in his view that there had been a fraud in accordance with the Privy Council decision in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*.[2] As things stand the learned Advocate-General contends, on behalf of plaintiff, that it is open to him to show and, that being granted, that he can establish that, irrespective of any question of a fictitious entry, there has been a fraud on the registration law. Taking it that he can argue on these lines we have to see whether he has made good his case in this connection.

The law on the subject may first be considered. In *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*[2] the Privy Council has stated that a fictitious entry

"intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged

2. (1914) L.R. 41 I.A. 110: I.L.R. 41 C. 972: 27 M.L.J. 80 (P.C.).

and intended to be charged in fact exists is a fraud on the registration law, and no registration obtained by means thereof is valid."

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Following this case there is the later Privy Council decision in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*,[3] in which the principle of the earlier decision was extended to the case of a mortgage bond in which property that actually existed was included without the mortgagor having any interest in it or the parties to the instrument having ever any intention that it should form part of the security. There has been a number of cases in this Court in which the principle underlying these decisions has been considered. In *Kunhi Sankaran Nambiar* v. *Narayanan Tirumumpu*[4] it was held that there was no fraud of the registration law where a second item was added in a mortgage-deed, not so much to give an additional security as to enable the mortgagor to get the document registered near where he was living. It was found that, whatever the original intention of the parties, they had deliberately included the second item in the mortgage and that its inclusion was not with the object of effecting a fraud on the registration law. Another case of this Court of the same year is *Narasimha Rao* v. *Papunna*[5] in which it was held that when a cent of land was included purely for the purpose of getting the deed registered by a particular Sub-Registrar, without any intention of passing title to the vendee, there was a fraud on the registration law. This decision, it may be noted, was passed, not with reference to the size of the property in question but only on a consideration of what was the intention of the parties with reference to it. In *Ramanathan Chettiar* v. *Muthukumara Pillai*[6] it was held that where the parties to a mortgage-deed intended a particular property, however small in value as compared with the rest, to be part of the security, although the motive for its inclusion might be mainly that the document should be registered by a particular Sub-Registrar, that motive could not be said in any way to be a fraud or violation of the Registration Act. This decision follows that of the Privy Council in *Hari Ram* v. *Sheodayal Mal*,[7] according to which the words "some portion of the property" in section 28 of the Registration Act are not to be read as meaning some substantial portion of the property. In *Rama Rao* v. *Vedayya*[8] it

3. (1921) L.R. 48 I.A. 127: I.L.R. 48 C. 509: 40 M.L.J. 489 (P.C.).
4. (1919) I.L.R. 43 M. 405: 38 M.L.J. 251.
5. (1919) I.L.R. 43 M. 436: 38 M.L.J. 327.
6. (1920) M.W.N. 487.
7. (1888) L.R. 16 I.A. 12: I.L.R. 11 All. 136 (P.C.).
8. (1922) I.L.R. 46 M 435: 44 M.L.J. 373.

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was held that the inclusion of an item in a mortgage-deed merely in order that the registration might be by a particular Sub-Registrar was a fraud on the registration law, but in this case it appears that the item of property in question did not belong to the mortgagor. In *Venkata Lakshmikantharaju Garu* v. *Venkata Jagannatha Raju Garu*[9] the decision was that the fact that an item of property within the jurisdiction of a registration district where a document of mortgage was registered did not belong to the mortgagor would not invalidate the registration of the mortgage as a fraud on the registration law, unless it were shown that the mortgagor and mortgagee colluded to insert the item in the mortgage-deed with the knowledge that the mortgagor had no title to it. The decision in *Marina Ammayi* v. *Sundayya*[10] is to a similar effect, while in *Chokkalingam Chettiar* v. *Athappa Chettiar*[11] it has been held that where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, he cannot be held to commit a fraud on registration which would render the whole transaction invalid. Rulings of the Bombay, Patna and Allahabad High Courts have also been cited before us in this connection. In *Viswanath Bhat* v. *Mallappa*[12] it was held that there could be no enquiry as to an alleged intention of the parties that an item of property which was included in a document so as to give jurisdiction to a particular Sub-Registrar was to be reconveyed. In *Mussammat Jasoda Kuer* v. *Janak Missir*[13] it is remarked that section 28 of the Registration Act requires no more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register a document in respect thereof, which remark must be read with the context which shows that the conveyor appeared *bona fide* to believe that he had a title to convey in this property and that it did not seem that there could be any idea of defrauding any one in having the registration effected in a particular office. The decision in *Durga Prasad Sahu* v. *Tameshar Prasad*[14] inclined to the view that even if it was a fact, which it was not found to be, that an item which existed and belonged to the vendor was inserted in a document merely for the sake of registration, that would not constitute a fraud on the law of registration.

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9 (1923) 46 M.L.J. 12. 10. A.I.R. 1929 Mad. 432
11 (1927) I.L.R. 50 M. 800: 53 M.L.J. 364.
12. (1925) I.L.R. 49 Bom. 821 13. (1924) I.L.R. 4 Pat. 394.
14. (1924) I.L.R. 46 A. 754.

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The general effect of all these decisions is that to establish fraud on the registration law there must be a collusion between parties to practise a fraud upon the registering officer, and that, as a test of whether the parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that could be conveyed by the party executant or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it is not perfectly clear that it will follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention. The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud. [His Lordship then discussed the evidence and continued as follows:]

The learned Advocate-General admits that the burden is on him to show that there has been a fraud on the law of registration. In the light of what is stated above we do not find that he has discharged the burden. The Vundoor site is one that actually exists; the title to it was in plaintiff's father who seems to have been its actual owner; it is not clear that there was no intention of passing possession of the item; and it is not shown that the parties had any reason that would make them practise a fraud on the registering officer. It follows, then, that Ex. I is a document which the plaintiff had to get set aside and that, as he did not bring this suit till more than three years after his attainment of majority, the suit fails as being out of time. [His Lordship then dealt with the questions regarding the binding nature of the alienation and the amount of mesne profits which would have been payable to the plaintiff in the event of his success which, in view of their Lordships' finding on the question of limitation, are not material for purpose of the report.]

In view of our finding on the point of limitation the appeal is allowed and the suit is dismissed with costs to the appellant against the plaintiff both in this Court and in the Court below. The finding stated above in paragraphs 15 and 16 will be embodied in the decree.

Wallace, J.

Wallace, J.—I agree.

I only wish to add a few words on the legal point. S. 28 of the Indian Registration Act is no doubt mandatory, and the question for decision under that section is "Is any portion of the property to which the document relates situate within the registration sub-district"? When property to which the docu-

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ment relates is non-existent section 28 has not been complied with (*Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*[2]). And where the document does not relate to certain property because the parties to it did not intend it so to relate, S. 28 has not been complied with (*Biswanath Prasad* v. *Chandra Narayan Chowdhuri*[3]). In both cases there must be a collusion between both parties to the document to deceive the Registration authorities, in fraud or violation of section 28 of the Act. (See *Venkata Lakshmikantharaju Garu* v. *Peda Venkata Jagannatha Raju Garu*[9]). It is important to note that not intending the document to relate to certain property is not the same thing as not intending to transfer that property or title thereto by means of the document. Otherwise all documents of benami transfer would be void by force of section 28. However desirable in theory such a conclusion may be, it is not at present the law, which has always recognised the validity of benami documents. Section 28 will not invalidate a benami document, because the parties to such a document do intend that it shall relate, so far as it has validity, to the property mentioned in it, and therefore are not colluding to deceive the Registration authorities.

When therefore the contention is raised that the inclusion in a registrable document of a particular piece of property was merely for the purpose of giving jurisdiction to the Registrar, the true test whether section 28 has not been complied with, will be, in cases where the parties intend the document to be a deed of real transfer, did they collude in intending that that piece of property should not pass (see *Narasimha Rao* v. *Papunna*[5] and *Rama Rao* v. *Vedayya*[8]); and in cases where the parties intend the document to be nominal or benami, did they collude in intending it not to apply, so far as it has validity, to that piece of property. The test for both cases is, did the parties, in including that property, intend to deceive the Registration authorities, and so escape the mischief of section 28? (See *Kunhi Sankaran Nambiar* v. *Narayanan Tirumunpu*,[4] *Chokkalingam Chettiar* v. *Athappa Chettiar*[11] and *Ramanathan Chettiar* v. *Muthukumara Chettiar*[6]).

K.C. ——— *Appeal allowed.*

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2. (1914) L.R. 41 I.A. 110: I.L.R. 41 C. 972: 27 M.L.J. 80 (P.C.).
3. (1921) L.R. 48 I.A. 127: I.L.R. 48 C. 509. 40 M.L.J. 489 (P.C.).
4. (1919) I.L.R. 43 M. 405: 38 M.L.J. 251.
5. (1919) I.L.R. 43 M. 436. 38 M.L.J. 327.
6 (1920) M.W.N. 487
8. (1922) I.L.R. 46 M. 435: 44 M.L.J. 373.
9. (1923) 46 M.L.J. 12.
11. (1927) I.L.R. 50 M. 800: 53 M.L.J. 364.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

Chinnan and others .. *Appellants** (*Defts.*)

v.

Ranjithammal .. *Respondent* (*Plff.*).

Chinnan *v.* Ranjithammal.

Easements Act (*V of* 1882), *Ss.* 52, 56, 59 *and* 62—*License—Nature of right—Revocation by transfer of property.*

A license is revoked by the transfer of property by the licensor. *Coleman* v. *Foster,* (1856) 1 H. & N. 36· 156 E.R. 1108 and *Wallis* v. *Harrison,* (1838) 4 M & W. 539: 150 E.R. 1543, followed.

A license is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and grantee Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents. So where, on the death of the original licensee, his heirs continue in occupation, their possession cannot be referred to an implied license. They are on no greater footing than tenants-at-will. They are trespassers whose possession is adverse to the owner of the property. *Vedapalli Narasimhan* v. *Dronamraju Seetharamamurthy,* (1907) I.L.R. 31 Mad 163· 18 M.L.J. 26, referred to.

Appeal against the decree of the Court of the City Civil Judge, Madras, dated 12th October, 1927, in O.S. No. 79 of 1927.

T. R. Venkatesa Aiyar and *T. V. Gopalaswami Aiyar* for appellants.

G. Devasahayam for respondent.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J.—In the suit out of which this appeal arises the plaintiff, as owner of land—a claim not now disputed—sued to eject the defendants from a portion of it. Her case was that one Poonjolai had served her predecessor-in-title as waterman, and had been permitted to put up a hut and live on a small portion of the land. The defendants are relatives of Poonjolai, and have succeeded him in occupation of the suit site, and have moreover, according to the plaintiff, encroached upon a further area. There are thus two questions arising for decision:

(1) Can the plaintiff eject the defendants from the site which Poonjolai was allowed to occupy?

(2) Can she eject them from the area encroached upon?

It is agreed that Poonjolai was allowed to occupy the site as a licensee. Since the license was granted the property has

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*C.C.C. Appeal No. 55 of 1927. 22nd October, 1930.

Chinnan v. Ranji-thammal.

Curgenven, J.

changed hands, the plaintiff's mother purchasing it from the Administrator-General in 1902 and settling it upon her daughter, the plaintiff, in 1922. It is not very easy to decide what is the effect upon a license in India of a transfer of ownership. Under S. 59 of the Easements Act,

> "When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license,"

and under S. 62 a license is deemed to be revoked

> "(a) When, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license"

These provisions do not in terms lay down that a license is revoked by a conveyance of the property. On the other hand, the English Law, which undoubtedly forms the basis of the Indian Statute, seems clear that the license terminates. "If a man gives a license and then parts with the property over which the privilege is to be exercised," says Pollock, C.B., in *Coleman* v. *Foster*[1], "the license is gone. A license is a thing so evanescent that it cannot be transferred." The same view is to be found expressed in *Wallis* v. *Harrison*.[2] There can be no doubt that the transferee is not bound by the license. But does the licensee, from the moment the transfer takes place, become a mere trespasser, or should he be considered until the contrary appears, to hold under an implied license? We do not think that it will become necessary in this case to decide that point, because, if the information given to us is correct (no evidence was taken), Poonjolai died in or about 1904. and there seems no doubt that the license expired with his death. The learned City Civil Judge seems to be in error in holding that the defendants came in as licensees, if by that he means that, after Poonjolai died, the license was (renewed) in their favour. Nor do we think, that the license granted to Poonjolai became vested in them as his successors. A license is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents (S. 56). Accordingly in their occupation of the plot, and especially so since the death of Poonjolai, the defendants have been mere trespassers. We have been invited to hold, on the analogy afforded by a Bombay decision, *Krishnaji Rama-*

1. (1856) 1 H & N. 36: 156 E.R. 1108.
2. (1838) 4 M. & W 539: 150 E.R. 1543.

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chandra v. *Antaji Pandiuranga*[3] that the occupation was permissive and not adverse. That case related to the successors to a life-tenant deceased, and it was held that the occupation was of that character unless and until an adverse title was expressly set up. But in two later Bombay cases, *Kanthappa* v. *Sheshappa*[4] and *Chandri* v. *Daji Bhau*,[5] it has been held that the possession of a tenant holding over is wrongful, and time begins to run against the landlord under Art. 139 of the Limitation Act as soon as the term of the lease expires—a view which is not easily reconcilable with the position that the occupation of tenant's successors is to be deemed permissive. We need not however look further for authority than to *Vedapalli Narasimham* v. *Dronamraju Seetharamamurthy*[6] for the proposition that the representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance would seem to be true also of a licensee. We think therefore that at least from the date of Poonjolai's death the possession of the defendants became adverse to the owner of the property. It will now be for the Lower Court to decide upon evidence whether the claim to that portion of the site is barred.

With regard to the area said to have been encroached upon—a matter not dealt with at all by the Court below—it will be for decision whether the plaintiff's suit is within time.

For trial of these questions, allowing the appeal and setting aside the decree, we remand the suit to the Lower Court. Costs to abide the event.

S.R. *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Samarapuri Chetti .. *Petitioner** (*Accused*)

v.

Corporation of Madras .. *Respondent* (*Complainant*).

Samarapuri Chetti v. Corporation of Madras.

Madras City Municipal Act (*IV of* 1919), *Ss.* 287, 357 *and Sch VI—Manufacturing and storing oil—Separate licenses for*

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*Cr.R.C. No 793 of 1930. (Cr.R.P. No. 736 of 1930). 30th January, 1931.

3. (1893) I.L.R. 18 B. 256
4. (1897) I.L.R. 22 B. 893
5. (1900) I.L.R. 24 B. 504.
6. (1907) I.L.R. 31 M. 163: 18 M.L.J. 26

Samarapuri Chetti v. Corporation of Madras.

The owner of premises cannot get a license for manufacturing oil, and then pack or store it without a license. But it is obviously inequitable to charge a person the same fee for manufacturing and packing or storing

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the 3rd Presidency Magistrate, Georgetown, Madras, in C.C. No. 11237 of 1930.

K. S. Jayarama Aiyar, K. Bhashyam Aiyangar and *P. Sundararaja Aiyangar* for petitioner.

C. Unikanda Menon for the *Crown Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been fined Rs. 76 under S. 287, Madras City Municipal Act (IV of 1919), read with S. 357. It is found that he is liable to pay a license fee of Rs. 50 for storage of oil on his premises, and Rs. 25 for a fifth press. Apparently the demand for the fifth press was not disputed.

By the wording of the statute it is clear that for the use of premises for any purpose specified in Sch. VI the owner must under S. 287 apply for a license. He cannot get a license for manufacturing oil, and then pack or store it without a license. But it is obviously inequitable to charge a person the same fee for manufacturing and packing or storing. This point was raised before the Standing Committee of the Municipal Council, and on 12th September, 1923, it resolved that no separate license is necessary for each process in respect of the same article: Ex. I. What is probably meant was that no separate fee is necessary, for under section 287 (3) a license is obligatory.

In these circumstances the present prosecution is difficult to understand. When confronted with Ex. I the Assistant Revenue Officer P.W. 1 merely said that he was not aware of it, and the learned Presidency Magistrate ignores it altogether. The right fine would therefore seem to be Rs. 26. This is not a question of law, but a mere matter of Municipal routine; and the resort to the Courts for what should be done in the office is strongly to be deprecated. When the matter does get to the Court, however, the Court should read the exhibits and not merely issue a summary ukase.

The fine is reduced by Rs. 50.

S.R. *Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Vaithilingam Pillai .. *Petitioner** (*Defdt.*)

v.

Kandaswami Pillai .. *Respondent* (*Plff.*).

Vaithilingam Pillai v. Kandaswami Pillai.

Civil Procedure Code (*V of* 1908), *O.* 43, *R* 1 (*u*) *and O.* 41, *R* 23—*Remand—Suit as originally framed entirely disposed of—Amendment of plaint disallowed—Suit if disposed of on preliminary point—O.* 6, *R.* 17—*Powers of amendment—Limitations to—Revision*

The plaintiff brought a suit to recover possession of certain properties on the ground that he was the reversioner to the estate of the last male holder. Subsequently, he applied for an amendment of his plaint alleging that the properties were the stridhanam properties of the wife of the last male holder and that he was her nearest heir. At the date of the application for amendment, a suit on the footing of the amended claim would have been barred. The trial Court disallowed the amendment and dismissed the suit as originally framed. The appellate Court allowed the amendment and remanded the case for disposal of the claim as amended.

Held, (*i*) no appeal lay from the order of remand, as the suit cannot be said to have been disposed of on a preliminary point.

Raman Nair v. *Krishnan Nambudripad,* (1922) I.L.R. 45 M. 900: 43 M.L.J. 354 (F B), distinguished.

Per Reilly, J.—"When a Court has disposed of the whole suit as it stands before it . . to say that it has disposed of the suit on a preliminary point merely because it has not dealt with the further issues, which might have arisen if the suit had been framed otherwise originally or if an amendment of the pleadings had been allowed later in the history of the suit, appears to me to be almost an abuse of language"

(*ii*) The High Court was nevertheless entitled to interfere in revision to avoid multiplicity of proceedings, and for that purpose the appeal may be converted into a revision petition.

(*iii*) The amendment ought not to have been allowed as it deprived the defendant of the plea of limitation.

Per Reilly, J—"A plaint may be amended at any stage of a suit subject to proper provision as to costs, for the purpose of bringing out the questions really in controversy between the parties or for correcting any mistake or error in the plaint which has obscured the plaintiff's real claim as intended by him; but plaints cannot properly be allowed to be amended if the amendment would change the fundamental character of the suit, would change a suit based on one legal relation into a suit based upon another one or a suit based upon one title into a suit based upon another title, when the plaintiff's claim on the second legal relation or title is time-barred on the date on which the application for amendment is made."

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of remand, dated 25th September, 1929, of the District Court of South Arcot in A.S. No. 277 of 1928 preferred against the decree of the Court of the District Munsif of Chidambaram in O.S. No. 679 of 1927.

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*C.R.P. No. 1126 of 1930. 31st July, 1930.

Vaithilingam Pillai v. Kandaswami Pillai.

M. Patanjali Sastri for petitioner.

K. Bhashyam Aiyangar for respondent.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—In one respect I am prepared to go further than my learned brother. In my opinion no appeal lies in this case. As has been pointed out, the District Munsif disposed of the suit on all the issues framed by him, and it is not contended that those issues did not cover the whole suit as it originally stood or omitted any contention raised by the defendant in his written statement or at the settlement of issues. When a Court has disposed of the whole suit as it stands before it in that way, to say that it has disposed of the suit on a preliminary point merely because it has not dealt with the further issues which might have arisen if the suit had been framed otherwise originally or if an amendment of the pleadings had been allowed later in the history of the suit appears to me to be almost an abuse of language. I am clear that nothing in the opinion of the Full Bench in *Raman Nair* v. *Krishnan Nambudripad*[1] would justify us in going so far as that. Mr. Patanjali Sastri suggested at one stage of his arguments that the history of the litigation which led up to the Full Bench decision was very similar to the history of this case. But on an examination of the printed papers in that case that suggestion appears to be incorrect. The plaintiff in that case did not, as Mr. Patanjali Sastri at first suggested, by a subsequent pleading put in after the written statement, raise a new plea, and the District Munsif was not held to have decided the suit against him on a preliminary point because he refused to take into consideration the contents of any such subsequent pleading. He decided the suit, it was held, on a preliminary point because he dealt with it on his view that the plaintiff did not raise in his original pleadings a certain plea, which the Subordinate Judge on appeal found he did raise, and shut out some evidence. That is quite unlike the present case.

But I agree that, although there is no appeal in this case, it is one in which we should interfere in revision. The learned District Munsif's refusal to allow the plaint to be amended appears to have been quite correct. As is well known, a plaint may be amended at any stage of a suit, subject to proper provision as to costs, for the purpose of bringing out the questions really in controversy between the parties or for correcting any mistake or error in the plaint which has obscured the plaintiff's

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1. (1922) I.L.R. 45 M. 900: 43 M.L.J. 354 (F.B.).

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real claim as intended by him; but plaints cannot properly be allowed to be amended if the amendment would change the fundamental character of the suit, would change a suit based on one legal relation into a suit based upon another one or a suit based upon one title into a suit based upon another title, when the plaintiff's claim on the second legal relation or title is time-barred on the date on which the application for amendment is made. Now, as has been pointed out in this case, the plaintiff's claim as the heir to the stridhanam property of Rajamanikathammal was time-barred on the date when he made his application for amendment to the District Munsif. If he had brought a suit on that basis on that date, he was bound to fail. But the learned District Judge has given him an opportunity nevertheless to sue on that time-barred claim. It appears to me that in so amending and remanding the suit the learned District Judge undoubtedly committed an irregularity in procedure, and, if it was an irregularity, it was certainly a material one. Therefore in my opinion this is a case in which we can interfere in revision and should do so.

I agree with the order proposed by my learned brother both as to costs and otherwise.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—The defendant has preferred this Civil Miscellaneous Appeal against the order of remand passed by the learned District Judge of South Arcot in Appeal No. 277 of 1928 on his file, by which he reversed the decision of the District Munsif of Chidambaram and remanded the suit for fresh disposal.

When this appeal was opened by the learned advocate for the appellant, Mr. Bhashyam Aiyangar who appeared for the respondent-plaintiff raised a preliminary objection that the appeal is not maintainable as it could not be said that the order of remand passed by the learned District Judge was passed under O. 41, R. 23 of the Code of Civil Procedure. The learned advocate argued that it must be taken that the order of remand in this case was passed under the inherent jurisdiction possessed by the appellate Court, and that in such cases no appeal would lie to this Court against the order of remand. To the preliminary objection the learned advocate for the appellant answered by referring us to the decision of the Full Bench reported in *Raman Nair* v. *Krishnan Nambudripad.*[1] We were taken through the opinions delivered in that case by all the three learned Judges who heard the reference to the Full Bench and

1 (1922) I.L.R. 45 M. 900: 43 M.L.J. 354 (F.B.).

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Mr. Patanjali Sastri for the appellant argued that the decision in the present case must be taken to be on a preliminary point within the meaning of the opinions of the learned Judges in the Full Bench case. Before dealing with this objection I think it is necessary that I should refer to the course the present case took in the first Court as well as in the Lower Appellate Court.

The plaintiff alleging that he was the reversioner to the estate of one Dharmalingam Pillai who died about 20 years ago filed the suit to recover possession of certain moveables or their value on the ground that they belonged to the estate of Dharmalingam Pillai and that on his death the same came to Rajamanikathammal, his widow, who died on the 29th August, 1924. The plaint, as we understand it, is based on the allegations that the properties belonged to the estate of the last male holder, that they were in the possession of his widow as a life-estate holder, and that on her death the defendant took possession of the same; and as the reversioner to the last male holder's estate the suit is laid by the plaintiff to recover possession of the moveables or their value. The plaint was filed on the 29th August, 1927. On the 10th November, 1927, the plaintiff filed an application to have the plaint amended by introducing a new cause of action. The plaintiff wanted to have the relief originally claimed in the plaint granted to him on the new ground that he put forward in the application, namely, that the properties belonged absolutely and as stridhanam properties to Rajamanikathammal, and as she left no nearer heirs than the plaintiff, the plaintiff wanted relief also on the footing that as the nearest heir of Rajamanikathammal, he would be entitled to those properties on the ground that they were the absolute stridhanam properties of that lady. The trial Court disallowed the plaintiff's request and dismissed that application and ruled that that was not a case where the plaintiff should be allowed to amend the plaint. The trial accordingly proceeded and the suit was, as originally laid (which was in fact the only plaint before the Court), tried on its merits on all the issues framed in the case, and the trial Court came to the conclusion that the properties referred to in the plaint did not belong to the last male holder but were the properties of Rajamanikathammal. The suit was accordingly dismissed by the trial Court. On plaintiff's appeal, the learned District Judge agreed substantially with the findings of the trial Court. The learned District Judge held that it was not proved that the properties were the properties of the last male holder. He also agreed with the trial Court

that the properties were the absolute properties of Rajamanikathammal. There was some difference of opinion as to whether all the items in suit were given to Rajamanikathammal by the defendant in the case or whether some were given to her by the defendant and some by Dharmalingam Pillai, but the Lower Appellate Court concurred with the finding of the first Court that the properties were not the properties of Dharmalingam Pillai.

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The Lower Appellate Court also agreed with the finding of the trial Court that, according to the allegations in the original plaint, it could not be reasonably contended that the plaintiff claimed any relief in the present suit based upon the properties being the absolute properties of Rajamanikathammal. The Lower Appellate Court was not prepared to accept the plaintiff's contention that, even without an amendment and on the allegation in the plaint as it stood, the plaintiff was entitled to have this new question also tried in the present suit. However, the learned District Judge thought that he should allow an amendment of the plaint by allowing the plaintiff to introduce into the plaint fresh allegations regarding the properties being the stridhanam properties of Rajamanikathammal and that the plaintiff was entitled to recover the same as the nearest heir of Rajamanikathammal. The defendant objected to the amendment. One of the grounds on which the defendant raised the objection was that on the date on which the application to amend the plaint was filed, the plaintiff's right to bring an independent suit claiming recovery of the properties on the footing of his being the heir to the stridhanam properties of Rajamanikathammal would be barred by limitation, and in the circumstances the defendant contended that the amendment should not be allowed. The learned District Judge, however, overruled the contention of the defendant, and directed that the plaint should be amended, as in his view the two claims could not be said to be "inconsistent with one another". He accordingly reversed the decree of the trial Court and remanded the suit for fresh disposal after allowing the plaintiff to amend the plaint in the way he sought to do. It is against this order of remand that the present appeal has been brought by the defendant.

In answer to the preliminary objections the learned advocate for the appellant relied strongly on the decision of the Full Bench reported in *Raman Nair* v. *Krishnan Nambudripad*[1] and he argued that all points should be taken to be preliminary where,

1 (1922) I.L.R. 45 M. 900 · 43 M L.J. 354 (F.B.).

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if the decision was in one way, there would be no necessity to try other issues in the suit. I do not think it is necessary for purposes of this case to give a decided opinion on the question whether in the present case there would be a right of appeal or not; but before leaving this part of the case I should like to observe that in properly appreciating the point before the Full Bench in *Raman Nair* v. *Krishnan Nambudripad*[1] it should be remembered that according to the pleadings in the plaint which was the subject of the reference before the Full Bench the plaintiff had filed a suit to recover possession of certain immoveable property and had alleged in the plaint that the defendants were holding the property on Adimayavana tenure and that they had declined to render services, and that accordingly the plaintiff was entitled to recover possession of the properties along with the paddy rent that had been allowed in respect of the services. The documents on which the suit was instituted contained reference to this "Adimayavana." The trial Court, however, declined to go into the matter because, as it remarked, it was not mentioned in the plaint that there was a forfeiture, and therefore the plaintiff was not entitled to any relief based upon forfeiture by reason of the non-rendering of the services. The Lower Appellate Court, on appeal filed by the plaintiff in regard to the dismissal of the suit as regards possession, held that the allegations in the plaint were enough to enable the plaintiff to raise the question, and to make the matter clear the plaint might be amended accordingly. It accordingly reversed the trial Court's decree and remanded the case for fresh disposal. It is against the order of remand that an appeal was preferred to the High Court, in which a Full Bench reference was made. I make these observations because in understanding the observations of the learned Judges whose opinions were delivered in the case, it may probably be useful to remember exactly the facts of the case before them with reference to which they made those observations. In the case before me, it is not now pretended that the allegations in the plaint would entitle the plaintiff to have this new case tried by the Court. In fact both the trial Court as well as the District Judge on appeal in the present case agreed with the defendant's contention that the plaint, as it stands, could not in any way be said to refer to this aspect of the case at all. That being so, can I say that the present is a case which has been disposed of by the trial Court on a "preliminary point" within the meaning of O. 41, R. 23, Civil Procedure Code? It

1. (1922) I.L.R. 45 M. 900: 43 M.L.J. 354 (F.B.).

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seems to me, as at present advised, that I cannot say that O. 41, R. 23 applies to the case before me. All the points that were actually raised before the trial Court were enquired into by that Court and findings have been recorded on all the issues framed; and the Lower Appellate Court has recorded an opinion in this case concurring with these findings of the trial Court. Taking it that it was open to the plaintiff to include in the original plaint the present cause of action also, does the fact that he omitted in the first instance to include this cause of action in the plaint but subsequently changed his mind and wanted to have the scope of the original suit enlarged by adding this particular cause of action also, which the trial Court did not allow him to do, enable us to say that the disposal by the trial Court was on a preliminary point? It seems to me difficult to say that it was. Our attention was drawn to some cases where this question of what is a preliminary point within the meaning of O. 41, R. 23 has been discussed. I must admit that on this question the cases are not uniform, and unless the case before us is covered by the Full Bench decision in which case of course we are bound by the same, it cannot be said that the matter is made clear by decided cases. As I said, it is not necessary for me to say decidedly whether an appeal lies or not in the present case, but as at present advised I think that it cannot be said that the disposal of the present suit by the trial Court was on a preliminary point within the meaning of O. 41, R. 23. I have not thought it necessary to pursue this matter further, because I am clear that the present is a case where the High Court should interfere in its powers of revision. Order 41, R. 23 limits the powers of the Appellate Court in the matter of passing orders on remand in cases where the trial Court's decision proceeded upon a preliminary point and the same is reversed on appeal. Now in the face of an express provision of law defining the powers of Appellate Courts to pass orders of remand, it seems to me at least doubtful whether Courts can rely upon the inherent power of remand in other cases. For the present, I do not think it is necessary for me to give a decided opinion upon this point, because, even assuming that Courts have got inherent powers in such cases, such powers should not be exercised in a case like the present. Here the plaintiff who was (I assume) at liberty to include the present cause of action also in his original plaint did not choose to do so. On the other hand certain statements made in the Lower Appellate Court would seem to suggest that the plaintiff omitted to do so for some purposes of his own. However, when he ultimately made up his mind to

apply to the Court to have the plaint amended, admittedly a suit instituted on that new cause of action would be time-barred. Courts should not ordinarily exercise their powers of discretion in such matters where their allowing the plaintiff to amend the plaint would prejudice the defendant by making the plea of limitation unavailable (most probably) to him. Courts have held that in passing orders regarding amendment, this principle should not be lost sight of. There is also the further fact that the Lower Appellate Court in this case thought it fit to exercise its powers of amendment at a very late stage and after the suit had passed through the first Court and had been heard on the merits by the trial Court. In the circumstances, I think that it was at least an irregular exercise of its jurisdiction in the present case which we are entitled to correct by virtue of our powers of revision. The learned advocate for the respondent, however, argued that even assuming that the defendant had all the rights that I have mentioned, the present is not a case where the High Court would be justified in interfering in revision. I am unable to agree. Courts have held that powers of revision can be properly exercised in cases where, but for the High Court's intervention, there would be multiplicity of proceedings, the time of the Courts would be unnecessarily taken and the parties put to unnecessary expense. In the case reported in *Sree Krishna Doss* v. *Chandook Chand*[2] Justice Miller had a case where it was argued that the High Court should not interfere in its powers of revision because the matter could be set right at a later stage by the filing of a fresh suit. This is what His Lordship stated in answer to the contention:

> "But here we have a case in which there is no doubt as to the rights of the parties, and no remedy if I do not interfere, except by a suit to which there can be no defence, and which therefore would merely multiply proceedings."

I may also refer to a recent decision of this Court reported in *Ramaseshayya* v. *Venkataramayya*,[3] where Cornish, J., and I had a case in which after a suit had been tried on its merits by the trial Court the Appellate Court ordered a remand for a new question to be tried whether the agreement relating to the exchange of two plots of land was opposed to public policy, a question not raised in either of the Lower Courts and which could not possibly arise having regard to the pleadings in the case. While holding that there would be no appeal against the order of remand passed in such a case, the Court held that

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2. (1908) I.L.R. 32 M 334: 19 M.L.J. 307.
3. (1930) M.W.N. 584.

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the High Court was not only entitled but in fact was bound to interfere in revision in such circumstances. It therefore seems to me that the present is pre-eminently a case in which we should interfere in revision; and, accordingly, I would set aside the order of remand passed by the Lower Appellate Court and dismiss the Appeal No. 277 of 1928 preferred by the plaintiff to the Lower Appellate Court with costs in the Lower Appellate Court. I direct that the appeal before us be treated as a Civil Revision Petition and I pass orders on that footing. There will be no costs in the High Court.

In the result, the District Munsif's decision will be restored.

S.R. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Atmakuru Butchiah Chetti ... *Appellant** (*Petitioner*)

v.

S. Tayar Rao Naidu and others .. *Respondents* (*Respondents*).

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Civil Procedure Code (V of 1908) S. 47 and O. 21, R. 2—Payment made prior to decree—Plea in bar of execution.

The ruling of the Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar,* (1916) I.L.R. 40 Mad. 233: 32 M.L.J. 13, covers only agreements which relate to execution and not to agreements which attack the decree itself.

Conflict of case-law referred to.

By the terms of a decree passed in accordance with an award in a suit for partition, the defendant was directed to pay a sum of money to the plaintiff. The decree was attached by the creditors of the plaintiff but the defendant pleaded in bar of execution that he had paid certain sums of money to the plaintiff prior to the decree and that credit should be given for those sums.

Held, (*i*) O. 21, R. 2 is not applicable to the case, as, the present, of payments made prior to the decree, and

(*ii*) the payments cannot be pleaded in bar of execution.

An amendment of a decree should not be allowed so as to prejudice the rights of third parties.

Hatton v. *Harris,* (1892) A.C. 547, referred to.

Appeals against the orders of the District Court of Ganjam at Berhampore in E.A. No. 38 of 1928 in O.S. No. 65 of 1927 and in E.P. Nos. 23, 25 and 26 of 1928 in O.S. No. 30 of 1922, respectively, and Petition under S. 115 of Act V of 1908 pray-

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*A.A.O. Nos. 253 and 264 to 266 of 1928 and C.R.P. No. 48 of 1930. 26th August, 1930.

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ing the High Court to revise the order of the District Court of Ganjam at Berhampore, dated 17th September, 1929 and made in C.M.P. No. 346 of 1928 in O.S. No. 30 of 1922.

B. Sitarama Rao and *B. Jagannadha Doss* for appellant.

P. Somasundaram for *C. Sambasiva Rao, B. Srinivasa Rao* and *D. Ramaswami Aiyangar* for *C. S. Venkatachari* for respondents.

The judgment of the Court was delivered by

Pakenham Walsh, J.

Pakenham Walsh, J.—The facts which have given rise to these appeals are as follows:—

The plaintiff, whom we may call Appanna, and the 1st defendant, whom we may call Butchiah, were brothers. O.S. No. 30 of 1922 was instituted in the Court of the District Judge of Ganjam for partition of the family property worth three or four lakhs. Defendants 2 to 4 in the suit were minors represented by their guardian, the 1st defendant. In 1923 there was a compromise with reference to certain outstandings due to the family and certain decree debts whereby the 1st defendant was to take over the plaintiff's share in the outstandings and the plaintiff was to be paid Rs. 17,000. This compromise is dated the 23rd of October, 1923 and was filed into Court on the 29th of October. It was signed by the plaintiff's pleader on the 27th of October and by the defendants' pleader on the 29th of October. It only related to some of the family properties and it was sanctioned by the Court so far as the minor members were concerned as it was in their interests on the 1st of November; and on the next day the Court passed the following order:—

"This compromise of part of the matters in dispute in the suit is recorded; so far as the minor defendants are concerned it has been sanctioned (I.A. No. 380 of 1923)."

As regards the immoveable property, there was a disposal by a preliminary decree on the 21st of February, 1924 and a Commissioner was appointed to make a division; and as regards the rest of the property there was a reference to arbitration and an award was passed on the 20th of December, 1926. This was remitted back and another award was made on the 20th of September, 1927. Under this award the 1st defendant had to pay about Rs. 11,000 to the plaintiff. The final decree was passed on the 27th of September, 1927, incorporating all the matters in the decree. This decree recites the compromise recorded between the parties on the 23rd of October, 1923. The plaintiff had several creditors who attached the decree so obtained by him. When execution was sought, the defendants took two

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objections, (1) that, with regard to the compromise of 1923, Rs. 15,000 had already been paid before the decree was passed and a receipt, Ex. XV, signed by the plaintiff on the 27th of October, had been filed into Court on the 29th of October, and therefore credit must be given for this sum, and (2) that, with regard to the sum of Rs. 11,448 which the defendants had to pay under the award dated the 20th of September, 1927, the plaintiff, being in need of money to conduct the suit, had money advanced to him by the 1st defendant up to Rs. 7,000 and credit for this should be given. The learned District Judge refused to go into either of these questions on the ground that he could not go behind the decree which was sought to be executed. The present appeals are against this order and similar orders which he passed on execution petitions by other creditors.

It may be mentioned that this receipt Ex. XV seems to have been filed into Court on the 29th of October, 1923, as it bears the Judge's initials on that date. There are no indications of who filed it and it is not alluded to at all in the compromise petition, dated the 23rd of October, 1923 and filed into Court which the pleaders for both the parties have signed. The plaintiff when examined in O.S. No. 30 of 1922, in the course of his statement about Ex. XV, said, "I signed the receipt Ex. XV. Defendant 1 (Butchiah) must have done as directed in Ex. XV." The learned District Judge rightly says that this evasive statement cannot be regarded as an admission by Appanna that he had actually received Rs. 15,000 under Ex. XV.

In arguing against the order of the learned District Judge, the learned advocate for the appellant takes up the position (1) that O. 21, R. 2 is not applicable to the case as it applies only to payments made after the decree and the parties must be in the position of judgment-debtor and decree-holder, and (2) that, even if it does fall under O. 21, R. 2, there is sufficient intimation to Court by the plaintiff and no further certification is needed. His main contention is that this pre-decree arrangement can be pleaded as a bar in execution of the decree. On the first point that the matter does not fall under O. 21, R. 2, we have no hesitation in agreeing with him. If authority were needed for the position, *Rama Ayyan* v. *Sreenivasa Pattar*[1] might be quoted. The present case is even stronger, for that was a case of adjustment after decree but not between the judgment-debtor and decree-holder. But even if we were to hold that O. 21, R. 2 can possibly apply on a strained view that this

1. (1895) I.L.R. 19 M. 230: 5 M.L.J. 218.

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receipt Ex. XV was to come into effect after the decree, we are of opinion that the provisions of the rule would not have been complied with. No doubt, as remarked by the Privy Council in *Raja Shri Prakash Singh* v. *The Allahabad Bank, Ltd.*,[2] a mere intimation by the decree-holder of payment is sufficient; and special application is not necessary. But in this case there is nothing to show that the plaintiff ever intimated the receipt of this sum to the Court. As noted above, his statement with regard to the amount having been paid is evasive. The document was one which should have been in the custody of the defendants and presumably therefore it was filed into Court by the defendants. Under O. 21, R. 2 (2), a judgment-debtor has got considerably more to do in order to get such payments recognised than merely to put the document into Court. The provisions of O. 21, R. 2 (2) have to be complied with and notice sent to the decree-holder as to why the Court should not record the payment. It is unnecessary to pursue this matter further in our view that O. 21, R. 2 does not apply to the present case.

There remains the further question whether an arrangement by the parties after the commencement of the suit but before the decree which has not been embodied in the decree can be set up or gone into in execution. The central point in this discussion is the ruling of the Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar*[3] [Abdur Rahim, Offg. C.J., Seshagiri Aiyar and Phillips, JJ., the latter dissenting.] What was actually decided in that case was that an arrangement for stay of execution of the decree entered into in the course of the suit can be gone into in execution. The High Court of Calcutta has always taken the view that it cannot, vide *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*[4] and *Hassan Ali* v. *Gauzi Ali Mir.*[5] In the other direction there are *Laldas Narandas* v. *Kishordas Devidas*[6] and *Gauri Singh* v. *Gajadhar Das.*[7] The previous Madras decisions and those subsequent to it up to *Venkatasubba Mudali* v. *Manickammal*[8] have been clearly set out by Wallace, J., in his judgment in the latter case. He points out that *Rama Ayyan* v. *Sreenivasa Pattar*[1] is not in point. The other two deci-

1. (1895) I.L.R. 19 M. 230: 5 M.L.J. 218.
2. (1928) L.R. 56 I.A. 30: I.L.R. 3 Luck. 684: 56 M.L.J. 233 at 239 (P.C.).
3. (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (F.B.).
4. (1902) I.L.R. 29 C. 810.
5. (1903) I.L.R. 31 C. 179 at 181.
6. (1896) I.L.R. 22 B. 463 (F.B.).
7. (1909) 6 A.L.J. 403.
8. (1925) I.L.R. 49 M. 513: 50 M.L.J. 364.

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sions, *Krishnamachariar* v. *Rukmani Ammal*[9] and *Subramania Pillai* v. *Kumaravelu Ambalam*,[10] lay down in general terms that a pre-decree arrangement that a decree when obtained should not be executed can be pleaded in bar of execution. Subsequent to the Full Bench case, *Chidambaram Chettiar* v. *Krishna Vathiyar*,[3] as observed by Wallace, J., there have been two divergent lines of decisions, one following this general principle and the other limiting the application of the Full Bench case. Amongst the former, he quotes *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar*[11] and *Velu Thevan* v. *Krishnaswami Reddi*.[12] Two cases not quoted by him which had been decided in this direction at that time are *Pedda Veeramma* v. *Gondimalla Veeranna*[13] and *Arunachala Goundan* v. *Swaminatha Aiyar*.[14] On the other side he quotes *Mallayya* v. *China Kotayya*,[15] which he distinguishes as an agreement before suit, *Ramanathan Chettiar* v. *Venkatachalam*,[16] *Arumugam Pillai* v. *Krishnaswami Naidu*[17] and *Singa Raja* v. *Pethu Raja*,[18] which last case he says is not in point as it turns on the interpretation of O. 34, Rr. 2 (*c*) and 5, and makes no reference either to *Chidambaram Chettiar* v. *Krishna Vathiyar*[3] or *Arumugam Pillai* v. *Krishnaswami Naidu*.[17] He does not, however, quote *Doraisami Moopan* v. *Subbalakshmi Palayee Ammal*.[19] This was a decision given on 17th December, 1917, shortly after the Full Bench case *Chidambaram Chettiar* v. *Krishna Vathiyar*,[3] which was in August, 1916. It held that the Full Bench case was not applicable to an agreement between the parties to a suit that no decree should be obtained therein. Since the decision in *Venkatasubba Mudali* v. *Manickammal*,[8] there is a decision of a single Judge in *Mulla Ramzan* v. *Maung Po Kaing*,[20] which considers the Calcutta, Madras and Bombay cases.

The learned advocate for the respondent argues that the present case does not fall under the Full Bench decision in *Chidambaram Chettiar* v. *Krishna Vathiyar*.[3] He says that the principle really laid down in that case is that, if there was any pre-decree arrangement by way of stay or non-execution of the decree, then such an arrangement relates to execution and

3 (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (FB).
8 (1925) I.L R. 49 M. 513: 50 M.L.J. 364.
9 (1904) 15 M.L.J. 370.
10. (1915) I.L.R. 39 M. 541.
11. (1918) 37 M.L.J. 356 — 12 (1924) 48 M.L.J. 277.
13 (1916) 5 L.W. 718. — 14 (1923) 46 M.L.J. 240.
15 (1921) 14 L.W. 317 — 16. (1923) 44 M.L.J. 599.
17. (1920) I.L.R. 43 M. 725: 39 M.L.J. 222. — 18 (1918) 35 M.L.J. 579.
19. (1917) 8 L.W. 205. — 20. (1926) I.L.R. 4 Rang. 418.

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can be pleaded as a bar in execution proceedings. But he urges that the cases subsequent to the Full Bench case have also emphasized another principle that the decree itself cannot be challenged in execution owing to an arrangement made during the suit. We think that there is a clear distinction between the two things; and if the cases are analysed it will be found that those which conflict with each other are almost all border line cases where, though in substance the effect of the agreement may be to alter the decree, in form it only affects its execution. Bearing this principle in mind, if we take the cases decided prior to the Full Bench case, we find that *Subramania Pillai* v. *Kumaravelu Ambalam*[10] was a case of an arrangement prior to the decree to enter up satisfaction of the decree. It was held that this could be gone into in execution. Here, in form, the matter was one of execution of the decree, though, in fact, the effect may have been to annul the decree. *Laldas Narandas* v. *Kishordas Devidas*[6] was a case of an agreement that as between two defendants costs should only be recovered from one of them. Here, in form, the matter may be held to be one of execution, though, in fact, the result may have been to alter the decree with regard to the costs recoverable from the defendants.

Turning to the cases subsequent to *Chidambaram Chettiar* v. *Krishna Vathiyar*,[3] the remarks about the Full Bench case in *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar*[11] are really *obiter*, as that case was decided under O. 21, R. 2, and it was held that there had been no certification. *Velu Thevan* v. *Krishnaswami Reddi*[12] was a case of an agreement prior to the decree not to execute the decree that might be passed against one judgment-debtor and to realise the whole amount from the other. Here it was held that this could be pleaded in execution. Here again, in form, the matter arises in execution though the effect of the arrangement may be to alter the decree as against one of the defendants. In *Arunachala Goundan* v. *Swaminatha Aiyar*[14] it was decided that the judgment-debtor can raise in bar of an application for execution presented by the legal representative of the decree-holder any defence such as that of estoppel which is personal to the legal representative. It is not clear

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3. (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (F.B.)
6. (1896) I.L.R. 22 B. 463 (F.B.).
10 (1915) I.L.R. 39 M. 541.
11. (1918) 37 M.L.J. 356.
12. (1924) 48 M.L.J. 277.
14. (1923) 46 M.L.J. 240.

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from the report what the precise nature of the agreement between the decree-holder and the judgment-debtor was, and the matter turned on whether the legal representative was estopped from disputing it.

As regards the cases which are adverse to the appellant since the Full Bench case and which turn on questions of this sort, the first is *Doraisami Moopan* v. *Subbalakshmi Palayee Ammal.*[19] This, as pointed out above, was soon after the Full Bench decision. The next, *Arumugam Pillai* v. *Krishnaswami Naidu,*[17] is an important case. One of the Judges was Seshagiri Aiyar, J., who was a member of the Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar.*[3] Here the arrangement was that the decree which might be passed should be inexecutable in part. It was held that such an agreement could not be enforced in execution. Seshagiri Aiyar, J., says:

"In *Chidambaram Chettiar* v *Krishna Vathiyar*[3] I rested my conclusion on the theory of *stare decisis*. It is argued before us by Mr. Jayarama Aiyar, that it follows from my judgment in that case that all the cases referred to therein as supporting the theory of *stare decisis* must be taken to have been accepted by me as correct. I do not think this suggestion is well founded The course of decisions was referred to for the general proposition that pre-decree arrangements are within the language of S. 47. I did not intend to accept as correct every one of the decisions I quoted for that purpose. On the other hand I want to make it clear that *Chidambaram Chettiar* v. *Krishna Vathiyar*[3] should not, in my opinion, be applied to what are termed cognate cases. Further, I am clear that an attack against the decree as having been obtained by fraud by one of the parties thereto is not within the principle of *Chidambaram Chettiar* v. *Krishna Vathiyar*[3]."

This is a very important observation coming from one of the learned Judges who decided *Chidambaram Chettiar* v. v. *Krishna Vathiyar*[3] and it is especially valuable because the only case directly on all fours with the present case which has been quoted to us, namely, the decision in *Pedda Veeranna* v. *Gondimalla Veeranna,*[13] was a decision passed by the same Judge with Ayling, J., between the Full Bench case and this decision. It is the only case which has been quoted to us of an agreement sought to be set up in execution, which seeks to attack the decree itself as in the present case, and was allowed to be pleaded in execution. There, in pursuance of an award made by arbitrators, the debtor tendered the amount payable on the due date, but the creditor refused to accept it and contested the validity of

3 (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (F.B).
13. (1916) 5 L.W. 718.
17. (1920) I.L.R. 43 M. 725: 39 M.L.J. 222.
19. (1917) 8 L.W. 205.

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the award. The debtor filed a suit to enforce the award and it was made a decree of Court. In execution of the decree, the decree-holder claimed interest on the sums mentioned in the award. It was held that as there was a tender prior to suit and as the tender was refused the decree-holder was not entitled to interest. This decision was rested on *Chidambaram Chettiar* v. *Krishna Vathiyar*,[3] and it is important to note that, as observed above, Seshagiri Aiyar, J., who was a party to that decision, expressly in the later case, *Arumugam Pillai* v. *Krishnaswami Naidu*,[17] restricted the principles which he meant to lay down in the Full Bench case. On the other side, there are several authorities both of this Court and other Courts that an agreement which directly strikes at the decree itself cannot be pleaded in execution. The first as noted above is *Doraisami Moopan* v. *Subbalakshmi Palayee Ammal*[10] in which it was held that an agreement between the parties to a suit that no decree should be obtained therein could not be pleaded in execution and that the Full Bench decision in *Chidambaram Chettiar* v. *Krishna Vathiyar*[3] did not apply to such a case. We have quoted *Arumugam Pillai* v. *Krishnaswami Naidu*.[17] In *Mallayya* v. *China Kotayya*[16] the respondents obtained a decree on their mortgage and sought the execution of the decree. The appellants set up an agreement entered into before the suit by which the respondents agreed to accept Rs. 1,500 and release certain items. It was held that this agreement could not be pleaded as a defence in execution of the decree. Spencer, J., remarked:

"The conduct of a party who collusively allows a Court to pass a decree at the same time privately agreeing with the plaintiff that such a decree should not be enforced is, in my opinion, committing a fraud on the Court, which should not be countenanced by permitting him to put forward such a plea in execution."

That case no doubt is distinguished by Wallace, J., in *Venkatasubba Mudali* v. *Manickammal*[8] by saying that it was a case of a pre-suit and not of a pre-decree arrangement. But we doubt whether this would make any great difference. In *Ramanathan Chettiar* v. *Venkatachalam*,[10] the decree amount was Rs. 36,000 and a pre-decree arrangement was alleged by which only Rs. 33,750 was to be recovered from defendants 2 and 3 and there was to be no recovery from defendants 1 and 4. The Court thought that the case resembled *Arumugam Pillai* v.

3. (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (F.B.).
8. (1925) I.L.R. 49 M. 513: 50 M.L.J. 364.
15. (1921) 14 L.W. 317.
16. (1923) 44 M.L.J. 599.
17. (1920) I.L.R. 43 M. 725: 39 M.L.J. 222.
19. (1917) 8 L.W. 205.

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Krishnaswami Naidu[17] and not *Chidambaram Chettiar* v. *Krishna Vathiyar.*[3] They followed the decision in *Arumugam Pillai* v. *Krishnaswami Naidu*[17] and held that this agreement could not be gone into in execution.

Finally, the recent case of *Mulla Ramsan* v. *Maung Po Kaing*[20] is very similar to the present case, and the authorities of Calcutta, Bombay and Madras have been considered. In that case, in execution proceedings it was pleaded by the judgment-debtor that prior to the passing of the decree he had entered into an agreement with the decree-holder, whereby in consideration of his confessing judgment for the full decretal amount of Rs. 2,000 the decree-holder agreed to accept Rs. 1,000 only and that accordingly the decree could be executed to that extent only; and it was held that a decree which on the face of it is enforceable to the fullest extent cannot in execution proceedings be challenged as being inexecutable, wholly or in part, on account of an agreement between the parties entered into prior to the decree, and that section 47 of the Civil Procedure Code had no application in that case The learned Judge says:

"Putting the most liberal construction on the words (of S 47), I fail to see how a question like the one involved in the present case can be said to relate 'to the execution or executability of the decree'. The words 'the decree' refer to the decree passed by the Court and of which the decree-holder is seeking execution It is only questions relating to the execution or executability of this decree, which the executing Court is directed to determine When a judgment-debtor sets up an agreement of this kind, that, prior to the decree, there was an arrangement between the parties that though the decree was to be passed for Rs 2,000 it should only be executed to the extent of Rs. 1,000 and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court, but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties. Without going to the extent of saying, as Mr. Justice Spencer of the Madras High Court does in one of the cases reported in the unauthorised reports *Mallayya* v *China Kotayya*,[13] that parties, who collusively allow a Court to pass a decree having privately agreed that the decree should not be enforced, are committing a fraud on the Court, I can at least say that parties who, having agreed that a decree should not be executable wholly or in part, pray the Court to pass an unconditional decree, are thereby inviting the Court merely to take part in a solemn farce."

In *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*[4] it was laid down that payment during the suit must be set up in the suit itself and this part of the judgment has not been dissented from in any of the Madras decisions.

3. (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (F.B.).
4. (1902) I.L.R. 29 C. 810.
15. (1921) 14 L.W. 317.
17. (1920) I.L.R. 43 M 725: 39 M.L.J. 222.
20. (1926) I.L.R. 4 Rang. 118.

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On a review of the authorities it appears to us that the Full Bench case, *Chidambaram Chettiar* v. *Krishna Vathiyar*,[3] only covers agreements which relate to execution and not to agreements which attack the decree itself. There may be, as noted above, certain pre-decree arrangements which, though in form they relate to execution, do in substance modify or totally nullify the decree; and in regard to these cases we find different decisions owing probably to the angle from which the matter is regarded. But the only case quoted to us in which the agreement directly alters the decree by something which does not relate to execution at all but means that the decree shall be executed for a sum different from what has been stated in the decree is *Pedda Veeranna* v. *Gondimalla Veeranna*,[13] and the effect of this decision is discounted by the subsequent remarks of Seshagiri Aiyar, J., in *Arumugam Pillai* v. *Krishnaswami Naidu*.[17] In all other cases of both this and other Courts, it seems to be quite clear that an agreement which does not relate to execution but directly attacks the decree itself cannot be pleaded in execution. We do not think it is necessary to express any opinion as to whether the defendants can file a separate suit on the basis of the alleged agreement. Nor do we wish to go into the question of *res judicata* in which connection *Mahabir Pershad Singh* v. *Macnaghten* [21] has been quoted, for there is a difference between decrees passed on contest and those which are passed on compromise between the parties—*Raja Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramaswamy Chetty*.[22] We think it would be most dangerous to allow a decree itself to be attacked in execution. In our opinion, the decision of the learned District Judge is correct and these appeals must be dismissed with costs.

A revision petition has been put in against an order refusing to amend the decree. For the reasons stated above, it is clear that the decree cannot be amended. Apart from this, only the attaching parties in one appeal suit are parties to this application, and, in any case, once third parties intervene, an amendment should not be allowed so as to affect such third parties—*Hatton* v. *Harris*.[23]

The petition is dismissed with costs.

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3. (1916) I.L.R. 40 M. 233: 32 M.L.J. 13 (F.B).
13 (1916) 5 L.W. 718
17. (1920) I.L.R. 43 M. 725: 39 M.L.J. 222.
21. (1889) L.R. 16 I.A. 107: I.L.R. 16 C 682 at 691 (P.C.).
22. (1911) I.L.R. 35 M. 75 at 83: 21 M.L.J. 709.
23. (1892) A.C. 547.

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One set of costs in C.M.A. No. 253; one set of costs in C.M.A. Nos. 264, 265 and 266.

Costs in the Civil Miscellaneous Appeals to be proportionate to the amounts claimed in execution by the various decree-holders.

S.R. *Appeals and petition dismissed.*

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THE M. L. J. PRESS, MYLAPORE.